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ABSTRACT

Long established common law precedent, the implied promise of one party not to obstruct the other, is the basis for the Government's duty to cooperate with the contractor and not to hinder it during contract performance. Breach of this obligation commonly results in recovery of an equitable adjustment by the contractor under either a constructive change or constructive suspension theory. However, determining whether there has been a breach can be difficult as each case must be decided on its facts, the magnitude of Government fault required before allowing recovery is uncertain, and the broad scope of the implied promise complicates application of other traditional recovery theories.

In its working relationship with the contractor the Government must avoid a destructive breakdown while still ensuring that it obtains its contractual entitlements. Although cooperation is especially critical in large and complex contracts, the Government is not required to make the work easier and has no duty to supervise a contractor's performance. Neither is it required to assist a contractor's early completion. However, the Government may not knowingly ignore contractor deviations during contract performance, hinder a contractor's early completion, or unduly pressure a contractor to complete performance. A contractor is also responsible for its own finances, although special considerations may apply for small businesses in the above areas.

A breach of this implied obligation can occur under numerous circumstances where the Government actively interferes with the contractor's performance. Various Government actions, such as overzealous inspecting, multiple or improperly conducted inspections, interrupting scheduled work performance by issuing disruptive change orders, too frequently visiting the work site, or interfering with performance; directing performance with specific or inconsistent directions, controlling contractor personnel assessments and terminations, choosing improper contract remedies, as well as other acts can hinder the contractor. Not only might the contracting officer be involved, but other personnel and agencies could actively interfere. However, various limitations, such as the Sovereign Acts doctrine, lack of materiality, and the on-scene arrival of a procurement contractor, may preclude a contractor from recovering for any such acts of active interference.

Lack of cooperation may breach the Government's duty to cooperate. Whether the Government's actions were reasonable depends upon the promptness of its actions and degree of increased difficulty of performance for the contractor. Unreasonableness may, however, not be found where the contractor fails to so prove, to give notice of increased difficulty, or waives its objections. Unreasonableness can occur in a variety of circumstances. In two contractor situations, due diligence by the Government generally relieves it of liability absent unreasonable delay. Notices to Proceed must be issued by any express date or within a reasonable time where no date is stated. Site availability may also be an issue where the Government was at fault, breached an express warranty, or delayed for its own convenience. Unreasonable delays in issuing change orders, conducting inspections, or in furnishing required equipment have also resulted in Government liability. However, where the contractor is on notice that buildings are to be occupied during renovation work, minor delays are considered part of the bargain. Additionally, agency, but not presidential or congressional, fault in providing required funding breaches this duty, although perfection is not the standard by which compliance is measured. Finally, unreasonable action in granting required approvals is actionable.

DUTY TO COOPERATE AND NOT HINDER

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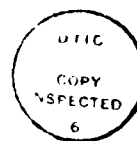
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CHAPTER 1

NATURE OF THE IMPLIED DUTIES

Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing.¹

I. THE IMPLIED PROMISE

It has long been recognized that every Government contract contains an implied promise by the Government to cooperate with and not to hinder the performance of the other party.² During contract performance this duty could arise under a variety of circumstances. For example, in George A. Fuller Co. v. United States,³ the Government agreed to furnish models needed by the plaintiff to construct the Archives Building in Washington D.C. Although the models were ultimately provided, their untimely delivery resulted in a six month delay to the contractor. The Court of Claims granted the contractor the damages it sustained as a result of the Government caused delay. The court relied upon long established common law precedent, finding that when one party stipulates that another shall undertake a certain performance, he impliedly promises not to obstruct or hinder the other in completing the task.⁴ Any such interference constitutes a breach of contract.⁵ Implicit within the court's reasoning was

recognition of the fact that the obligation of good faith and fair dealing served as the basis for such a conclusion.⁶

The importance of this Government promise is underscored by the drastic consequences that may result from the Government's failure to observe its obligations. Wrongful terminations for default, those initiated despite the Government's breach of its implied duties, are routinely converted into convenience terminations, either by the Reiner rule or by operation of the applicable Default clause.⁷ The Government obviously loses the desired impact of a default termination when its failure to comply with its obligations results in a conversion to a convenience termination. In addition, Government breach of its promise has resulted in the setting aside of liquidated damages,⁸ justified the contractor's failure to proceed,⁹ and constituted an informal acceptance where the Government unduly delayed in rejecting tendered supplies.¹⁰ Such costly side effects must necessarily result in Government sensitivity to the requirement that it cooperate with the contractor.

To begin to examine the scope of the Government's obligations, it is first necessary to define the nature of an implied duty. Basically, implied duties are those that are not specifically resolved or defined. The Court of Claims has stated that the nature of implied duties are to

be ascertained from the "particular contract, its context, and the surrounding circumstances."¹¹ Obviously, a particular contract may contain express obligations. The Government could explicitly be required to assist the contractor if certain conditions are encountered and the contractor could also have explicit duties to cooperate.¹² Implied duties, by their very nature, cannot be inconsistent with any such express obligations.¹³ Thus, contract clauses may relieve the Government of potential liability for noncompliance with what would have been normal implied obligations.¹⁴ Additionally, the Government may limit its liability for untimely action by expressly establishing a specific time period within which to act.¹⁵

II. RECOVERY THEORIES

Recent cases concerning whether the Government has fully complied with its implied duties have been decided under either a constructive change or constructive suspension theory.¹⁶ A constructive change, such as the contractor's performance of extra work, commonly results from the Government's breach of its duty to cooperate. Under common law analysis, the contractor could seek relief for being required to perform extra work under either implied contract or breach of contract theories.¹⁷

However, pre-1978 administrative procedures in government contracting precluded use of these theories and so the boards of contract appeals developed an alternate recovery theory, the constructive change.¹⁸ Although the Contract Disputes Act of 1978, now brings most such breach claims within the scope of its procedures the constructive change doctrine remains alive and well.¹⁹ The elements of a constructive change have been described as being very simple in nature, composed of merely "two elements -- the 'change' element and the 'order' element."²⁰ Commentators have also pointed out that Government fault satisfies the order requirement.²¹ In contrast to the extra work resulting from a constructive change, a constructive suspension occurs where there is a work stoppage absent an express order by the contracting officer for which the Government is responsible.²² Government responsibility is typically found where the Government breaches its implied duties to cooperate and not to hinder.²³

Between these two contractor recovery theories, the constructive changes rationale normally has priority. Language in the current Suspension of Work clause provides that no price adjustment shall be provided, "for which an equitable adjustment is provided for or excluded under any other provision of this contract."²⁴ Numerous cases have also found a constructive change where it could be argued

that a suspension had really occurred.²⁵ However, it is clear that relief under the Suspension of Work clause is not precluded,²⁶ that relief can be apportioned between the two clauses,²⁷ and that the Suspension of Work clause overrides the constructive changes theory for delay not related to added work.²⁸

III. AMBIGUITY REMOVAL

The ambiguity of these implied Government duties cannot be overstressed. In effect, a tri-faceted ambiguity exists. First, since the duties are unstated and must be determined by the circumstances surrounding the contract, their exact nature is always uncertain. Second, although Government liability is normally analyzed similarly whether a contractor's claim is cast as a breach or constructive change, early cases had indicated that a contractor could recover for less egregious acts under the constructive change theory than for breach.²⁹ Thus, a contractor may be able to recover for Government conduct not approaching the magnitude of a breach. As the Government cannot be held to a standard of perfection in its dealings with contractors, uncertainty exists concerning how much Government fault is needed to cross the recovery threshold. Third, the scope of the Government's implied duties to cooperate and not to hinder is uncertain. One

recent case even extended its reach to encompass the duty to disclose information, traditionally included within the defective specification arena.³⁰ The purpose of this paper is to remove some of the existing ambiguity through an examination of three separate areas:

- 1) The Government Contractor working relationship,
- 2) Government acts comprising active interference, and
- 3) Government failure to cooperate with the contractor.

By clearing away some of this existing ambiguity greater certainty can be achieved and conducting business with the Government made more predictable. Greater predictability in conducting business can only result in the improved delivery of needed goods and services, benefiting both the Government and private industry.

CHAPTER 2

THE GOVERNMENT-CONTRACTOR WORKING RELATIONSHIP

Cooperation between the Government and the contractor is legally required. This is so even though to a great extent the parties are genuine adversaries. The Government seeks to obtain the agreed upon services at the contract price while the contractor has an economic incentive to provide the least possible effort during contract performance. This natural dichotomy must be harmonized to prevent a destructive breakdown in contractual relations. In Ingalls Shipbuilding Division,³¹ the contractor agreed to deliver three nuclear submarines by the scheduled delivery date and the Government agreed to provide the hull steel necessary for their construction. The Armed Services Board of Contract Appeals (ASBCA) found that given their "common goal" for delivery of the specified submarines by the scheduled dates, the parties "should have been partners in the undertaking."³² Therefore, the Government's duty to cooperate necessitated that it should have provided the contractor the hull steel in sufficient time to allow it to construct the three submarines and deliver them by the agreed date.³³

The extent to which the Government must cooperate with various contractors depends upon the circumstances. Obviously, in Ingalls, the degree of cooperation required

was heightened by the aura of partnership assumed by the Government when it agreed to furnish the hull steel. The ASBCA has, however, stated that differences in the "degree of cooperation and assistance" provided by the Government figure into its analysis as to whether the contractor may recover in a dispute with the Government.³⁴ In large, complex contracts, this degree of cooperation may be increased. In Hardie-Tynes Manufacturing Co.,³⁵ the Government was criticized for failing to promptly respond to the contractor's three deviation requests on the manufacture of four launch valve assemblies, the largest launch valves procured by the Navy. Noting that deviation requests are to be expected in contracts for large and complex equipment and that cooperation is especially critical in such contracts, the ASBCA found that the Government was responsible for the subsequent delay in production.³⁶ However, the duty of cooperation does not extend to agreeing to arbitration by a third party should a dispute arise. Not only is this beyond the purview of cooperation, but it may also exceed the limits of a contracting officer's discretion.³⁷

Successful cooperation has not always been forthcoming. The annals of Government procurement are replete of instances where there have been destructive breakdowns in the contractual relationship between the Government and the contractor. For example, suspicious

attitudes have led to contractual "nit-picking",³⁸ personality conflicts and temper tantrums precluded amiable settlements³⁹ or could have led to violence,⁴⁰ resulted in verbal abuse and rudeness,⁴¹ generated officious attitudes,⁴² or even resulted in threats to do physical harm to one another.⁴³ Obviously, a little more cooperation in these incidents might have resulted in the better achieving of common goals.

I. GOVERNMENT NOT REQUIRED TO MAKE WORK EASIER

The Government's duty to cooperate does not require that it make the work easier for the contractor. The United States Court of Appeals for the Federal Circuit (C.A.F.C.) has stated, that the Government, just as any other party, is entitled to receive that for which it has contracted.⁴⁴ Likewise, the Claims Court and various boards of contract appeals, have espoused this view.⁴⁵ Application of this "not easier" rule occurs under various circumstances. For instance, although the Government must display the same cooperative attitude towards all contractors,⁴⁶ the granting of identical deviations from contract requirements to different contractors is not required.⁴⁷ Courts and boards have approached this issue using a course of dealing approach. Usually, the contractor cannot rely upon deviations granted to other

contractors, however, under unusual circumstances the contractor may be able to establish that its interpretation of an ambiguous contract term was reasonable.⁴⁸ Similarly, the Government is not required to excuse all late deliveries,⁴⁹ provide better working conditions than per the contract,⁵⁰ nor expedite the processing of permits for one contractor in preference to another.⁵¹

II. SUPERVISION REQUIREMENTS

Although it is clear that the Government has no duty to supervise or inform the contractor of deficiencies during either first article production or contract performance, Government fault in deliberately refraining without reason from pointing out deficiencies to the contractor might constitute a constructive change to the contract. In Applied Devices Corp.,⁵² the Government terminated for default a contract for missile control sections because four first articles failed performance testing in one or more critical aspects. In upholding the default, the ASBCA ruled that the Government was not required to "hold its hand" or supervise step by step appellant's fabrication of the first article."⁵³ Similarly, in J.J. Welcome Construction Co.,⁵⁴ the Agriculture Board of Contract Appeals (AGBCA) found that the Government had no duty to inspect work during

performance to enable the contractor to ascertain if it was in compliance with contract specifications.⁵⁵ However, it has been stated that, "[t]he Government might be estopped to require correction of non-complying work if during its performance an inspector knows the work is non-complying and deliberately refrains without reason from pointing it out to the contractor."⁵⁶ Three separate examples illustrate the application of this rule. First, the contractor can recover where the Government is aware of potentially unacceptable work being done by the contractor, whereas recovery is generally not allowed when the Government inadvertently overlooks a contract deviation.⁵⁷ Second, knowing observance by the Government of contractor testing to a more stringent standard results in a constructive change to the contract, whereas lack of Government knowledge of such a nonconformity will not waive contract requirements.⁵⁸ Third, active Government malfeasance, such as reprimanding work crews for not cleaning areas about to be painted, when the Government representative was aware that those specific areas were not required to be painted, breaches the Government's duty to cooperate.⁵⁹

III. EARLY COMPLETION

The Government may not hinder a contractor's early completion of its performance, although it has no duty to

assist in early completion. In United States v. Blair,⁶⁰ the Supreme Court acknowledged that the Government does not have a duty to assist a contractor in completing its performance early.⁶¹ In accordance with this line of reasoning, the Government also has no implied duty to aid an antecedent contractor complete its performance early so that the present contractor could attempt to complete early by starting early.⁶² However, the Government may not hinder a contractor's early completion; interference or lack of cooperation is a breach of the Government's implied duties.⁶³ When the Government "is guilty of 'deliberate harassment and dilatory tactics' and a contractor suffers damages as a result of such action" the Government is liable.⁶⁴ The Claims Court has also stated that it is "settled that a contractor is not precluded from recovering delay (or impact) damages merely because it completed a contract within the period provided by the contract."⁶⁵ However, the Government is not liable for any gratuitous assistance rendered in attempting to assist the contractor's early completion. In Milmark Services, Inc. v. United States,⁶⁶ the Government terminated the contractor for default for failure to provide data entry services in connection with the processing of forms for the Immigration and Naturalization Service (INS) of the Department of Justice. After Milmark Services prepared a test tape, INS gratuitously agreed to review it and provide

the contractor with results of the review. Although the INS should have fulfilled its promise as a matter of courtesy and cooperation, its failure to do so did not result in a breach of its legal obligations and the contractor's nonperformance was not excused.⁶⁷ Efforts made in the spirit of cooperation simply are not sufficient to shift liability from the contractor to the Government, especially where the contractor is specifically allocated such liability under the contract.⁶⁸

IV. GOVERNMENT PRESSURE ON CONTRACTOR TO COMPLETE

Even though the Government has no duty to assist the contractor's early completion, it is clear that it may place reasonable pressure on the contractor to complete on schedule. When a contractor appears to be behind schedule, an obvious conflict develops between the Government's duty to cooperate and its concurrent desire to obtain its contractual entitlements. Where Government pressure on the contractor to complete performance exceeds that which may reasonably be expected, a compensable acceleration may be found. An implied Government order to complete work by a date earlier than that to which the contractor is entitled breaches the Government's duty to cooperate and results in the finding of a constructive acceleration.⁶⁹ However, reasonable pressure to complete on schedule is not such an

acceleration order. Reasonable pressure has been found where the Government merely expressed its concerns about progress of the contractor⁷⁰ as well as when the Government pressured the contractor to proceed promptly with production of a second set of first articles but did not tie this to a threat to terminate for default notwithstanding excusable delays.⁷¹ Additionally, the Government may threaten to do what it is legally authorized to do. In Maintenance Engineers,⁷² the ASBCA found no harassment where the Government threatened to assess liquidated damages for delinquent performance. Assuming that this threat occurred, the board found no harassment as the contract authorized the Government to deduct liquidated damages for late performance.⁷³ In contrast, unreasonable pressure has been found where government employees stated that the program was of such high priority that delays could not be tolerated⁷⁴ and where the Government stated that there was an urgent need for completion in conjunction with threatening to assess liquidated damages for noncompletion.⁷⁵

As the effects of a termination for default may be quite severe for a contractor, a threat to default terminate constitutes a separate subarea. As a general rule, to threaten a default termination constitutes an acceleration order.⁷⁶ However, a special exception exists for the reestablishment of a delivery date after the

Government has waived its right to terminate. In reaching this agreement the Government may employ hard bargaining tactics, including the threatened use of a default termination, so long as there is no duress. In Simmonds Precision Products, Inc. v. United States,⁷⁷ the Court of Claims expressly approved of the use of a threatened default to reestablish a "waived" delivery schedule. The court noted that the contractor had agreed to the reasonable delivery schedule and insertion of a liquidated damages clause after the contracting officer had threatened default. Approving of the contracting officer's actions, the court found that the Government had merely followed judicial guidelines for reestablishing a delivery schedule.⁷⁸ Duress has been found where the Government did not in fact possess the right to terminate. In Urban Plumbing & Heating Co. v. United States,⁷⁹ the Court of Claims decided that the Government had no right to terminate a contractor for default where the contract prohibited default termination because of delays due to unforeseeable causes. The contracting officer's threats to default terminate the contract, which had been delayed because of severe winter weather, therefore, amounted to coercion and duress. As a result, a negotiated delivery schedule, which granted a time extension, but no price increase, for the Government's unreasonable delay in rejecting equipment, was nullified.⁸⁰

V. FINANCIAL COOPERATION

The contractor is responsible for its own finances and the Government is not required to assist it by exercising an option, promoting demand for its services, assuming liability for production expenses incurred prior to first article approval, or terminating the contract for the contractor's convenience. However, the Government may be required to cooperate with a contractor seeking to reduce its own expenses. Basically, an option is a unilateral right of the Government and the Government is not required to exercise an option merely to make performance economically feasible for the contractor.⁸¹ This principle applies even when circumstances surrounding performance may have drastically changed for the contractor. For example, in Vanguard Industrial Corp.,⁸² a fire destroyed the contractor's plant and expensive retooling would have been required for the contractor to complete performance. Only through exercise of the available option would continued performance have proved economically feasible for the contractor. The ASBCA specifically found that no such contractual obligation existed.⁸³ However, it did note that the Government had made more than a reasonable effort to help the contractor recover by loaning it, free of charge, fourteen pieces of equipment.⁸⁴ Similarly, the decision to terminate a

contract for convenience is to be exercised in the Government's best interests and the Government has no duty to terminate a contract for convenience to benefit the contractor.⁸⁵

The Government is not obligated to assist a contractor by taking positive action to generate additional demand. In Excel Services, Inc.,⁸⁶ the contractor argued that the Government failed to cooperate by not circulating an advertising brochure and assisting Government users in the preparation of required scripts. Summarily rejecting the contractor's contentions, the ASBCA merely stated that the duty to cooperate did not extend so far.⁸⁷ However, the Government may be required to assist in reducing expenses. In Aden Music Co.,⁸⁸ the ASBCA rejected the Government's motions to dismiss for failure to state a claim and for summary judgment. The contractor had claimed that the Government failed to cooperate with it in reducing tour expenses. Thus, failure to cooperate with a contractor in efforts to reduce expenditures may constitute a breach of contract.⁸⁹

Finally, it is clear that the Government is not required to assume liability for production expenses incurred prior to first article production. As a general rule, the Government is not required to "hold the bag" for the contractor where it procures long lead time articles before first article approval.⁹⁰ Silence of the

Government, with the knowledge that production is proceeding, does not constitute a Government assumption of this liability. Even an improper rejection of a first article does not entitle a contractor to recover production unit costs in a termination for convenience settlement. In Semco, Inc. v. United States,⁹¹ the Government initially terminated for default a contract calling for the production of twenty three electronic subassemblies upon two successive first article submission failures. Although the contracting officer later converted the default termination to one for convenience, the contracting officer's final decision only allowed expenses allocable to the first two articles and disallowed costs incurred in producing the remaining units. The contractor argued for allowance of such costs, contending that but for a defect in the first article testing, its submissions would have been approved, such approval triggering Government liability for the production costs of the remaining articles. The Claims Court rejected this argument reasoning that the clear language of the contract's first article clause unambiguously places the risk of early production on the contractor.⁹² Although the court discussed a number of exceptions to this general rule, it found that none applied in the instant case.⁹³

VI. SMALL BUSINESS CONSIDERATIONS

The Government's duty to cooperate may require special assistance for small businesses. It is Government policy, "to place a fair proportion of its acquisitions ... with small business concerns and small disadvantaged business concerns."⁹⁴ Additionally, heads of contracting activities must, "take all reasonable action to increase small business participation in their activities' contracting processes."⁹⁵ Technical assistance is also to be specifically provided section 8(a) subcontractors.⁹⁶ In Johnson Textile and Plastics Co.,⁹⁷ the Government met this requirement by providing substantial assistance when it visited the contractor's facilities to assist appellant and by twice contracting for consultant services to provide technical, production, and management advice. Based upon this generous support, the ASBCA concluded that the contractor's failure to deliver conforming uniforms was not excusable and upheld the termination for default.⁹⁸ However, if the contractor fails to ask for assistance, none need be given. At least for experienced small business contractors, a failure to request assistance nullifies any Government requirement to provide special help.⁹⁹

A small business is also bound to the responsibilities inherent in a two step procurement. In Hydrospace

Electronics & Instrument Corp.,¹⁰⁰ a small business contractor's technical proposal for the design of a deep submergence rescue docking transponder was accepted for contract award under a two step procurement.¹⁰¹ Although the contractor had based its bid price on a certain design which deviated from its technical proposal, the contractor had failed to indicate this alteration in its proposal to the Government. Necessary redesign was, therefore, not compensable as it was not a constructive change to the contract. Although the ASBCA specifically noted that the contractor was a very small business, it held the contractor to its original design parameters, thus foreclosing a possible small business exception in this area.¹⁰²

CHAPTER 3

ACTIVE INTERFERENCE

During contract performance a breach of the implied obligation not to hinder performance can occur under numerous circumstances where the Government actively interferes with the contractor's performance. Various Government actions, such as overzealous inspecting, interrupting scheduled work performance by issuing change orders or visiting the work site, directing the manner of performance, controlling contractor personnel assessments and terminations, choosing improper contract remedies, as well as other miscellaneous acts can hinder the contractor. Not only might the contracting officer be involved, but technical representatives, inspectors, and other agencies could also actively interfere. However, various limitations, such as the Sovereign Acts doctrine, the fact that the interference was only an isolated incident or that the Government promptly resolved the situation, as well as the on scene arrival of a procurement contractor, may preclude a contractor from recovering for any such acts of interference.

I. OVERZEALOUS INSPECTIONS

Government exercise of its right to inspect may unduly interfere with the contractor's performance. The Court of

Claims has recognized that such interference and breach of the Government's implied duty to cooperate is a constructive change.¹⁰³ Government interference may occur through multiple inspections and improper performance of an inspection resulting in incorrect rejections of tendered goods. No interference will be found, however, where the Government uses reasonable inspection standards or the contractor fails to prove an incorrect rejection.

A. MULTIPLE INSPECTIONS

Multiple inspections are not a breach of the Government duties if reasonably conducted and the contractor is not unduly delayed¹⁰⁴. In Delta Engineering Services,¹⁰⁵ the Government became suspicious of the contractor's test method and insisted upon retesting when it learned that the contractor had verified compliance with a 200 p.s.i. pressure limit by using a gauge which had no calibration beyond the 150 p.s.i. mark. Navy reservations concerning the validity of the contractor's testing procedures were found to be reasonable, however, the ASBCA noted that had the pipe lines proved acceptable, the contractor would have been compensated for its additional time and money.¹⁰⁶ The contractor will also be compensated if multiple inspections are inconsistent with one another. Increasing the frequency of safety

inspections from monthly to weekly has been held to be such a constructive change and hence compensable.¹⁰⁷ Likewise, multiple inspections of the same work by different inspectors where previously approved items are subsequently disapproved¹⁰⁸ and multiple inspections which are known by the contracting officer to have a disruptive effect on contract performance constitute an unreasonable interference.¹⁰⁹ A proliferation of Government inspectors is also likely to result in inconsistent inspections.¹¹⁰ This applies especially where inspector training is less than adequate.¹¹¹

B. IMPROPERLY CONDUCTED

An improperly conducted inspection often results in interference with the contractor. The unknowing use of faulty test equipment to reject a lot of fuse switches is but one example.¹¹² Another illustration is the use of poor quality test samples.¹¹³ Performance to a higher standard as a result of improper testing results in additional Government liability.¹¹⁴ Where the number of defects is incorrectly tallied, resulting in an improper rejection, the contractor is entitled to an equitable adjustment.¹¹⁵ An inspection is also improper when the inspector directs performance in a specific manner.¹¹⁶ The extent of direction may range from clarification on

mere details of some of the work to a complete take over of supervision.¹¹⁷

Government use of overly strict tolerances results in an improperly conducted inspection absent specific justification for the stringent standard. In Shirley Contracting Corp. and ATEC Contracting Corp., (JV),¹¹⁸ the Government's use of a noncontractual seven percent rejection standard for unacceptable rock was improper where the industry standard was ten percent. Additionally, the evidence established that up to ten percent unacceptable rock permitted construction without structural problems.¹¹⁹ Stringent inspection standards may be justified where the work is of poor quality or where the Government finds a significant amount of defective work.¹²⁰ However, rejection of this more stringent standard is required when the initial Government finding of defective work is overturned. In H & H Enterprises, Inc.,¹²¹ the ASBCA converted a default termination into one for convenience where the Government improperly rejected a lot of wooden ammunition boxes and pallets. Several defects listed by the Government were found to have been invalid, resulting in the improper rejection of the initial lot. As the initial rejection was wrongful, the subsequent imposition of tightened inspection guidelines was also improper.¹²²

Government failure to establish an initial reasonable inspection standard may constitute improper inspection

procedures. Failure to establish an inspection standard may excuse a termination for default¹²³ whereas a zero tolerance inspection standard imposed upon a contractor contrary to the contract specification and normal trade practices amounts to an unwarranted interference by the Government.¹²⁴ Imposition of stricter inspection standards during the latter stages of contract performance, where no initial standard has been established, is proper so long as only nonconforming work is rejected.¹²⁵ The agency BCA may also disregard any unreasonable portion of an inspection standard in determining whether a contractor achieved acceptable results. In Michael Baird,¹²⁶ one of twelve factors considered in determining the quality of tree planting, was determined to be defective. Even if this defective factor had been eliminated, however, the contractor would have been unable to prove that it would have achieved an acceptable planting level. Therefore, the AGBCA denied the contractor's claim for compensation.¹²⁷

C. NOT OVERZEALOUS

Active interference is not found where the Government employs reasonable inspection standards or the contractor fails to prove an incorrect rejection. Standards have been found reasonable when the work fails to conform to contract specifications.¹²⁸ That errors may occur or judgments

vary between inspectors or even with one inspector does not, per se, make a standard unreasonable. In Pacific Reforestation, Inc.,¹²⁹ the contracting officer determined there was a trend of wasted trees and subsequently, charged the contractor in accordance with specific contract provisions. The contractor's challenge to the Government's claim was based upon on-site observations by the prime contractor where it witnessed errors made by inspectors in the taking of sample plots. Rejecting the contractor's challenge, the AGBCA simply stated that, "errors will be made from time to time and that the exercise of judgment may vary somewhat among inspectors or even by the same inspector."¹³⁰ Consequently, the contractor failed to carry its burden of proof that the inspection or results of inspection were erroneous.

The contractor may also simply fail to prove an incorrect rejection by lack of evidence or a contemporaneous complaint, or by failing to support its allegation of a biased inspector. Even though the Government bears the burden of proof that rejected work fails to conform to the contract, where a contractor fails to keep any records detailing specific instances of incorrectly rejected work, its allegations must be rejected.¹³¹ Obviously, the contractor will prevail where the government inspector admits liability.¹³² Lack

of a contemporaneous complaint by the contractor customarily results in a failure of the contractor's claim.¹³³ The contractor also frequently fails to adequately support its allegation of bias by a previous inspector.¹³⁴ However, where the contractor's records show that the inspector disregarded the inspection plan, unreasonably delayed the contract work, failed to supply the contractor with a copy of the stricter standards he was applying, and in general demanded a higher quality pin than contractually required, an arbitrary and capricious inspection has been adequately demonstrated.¹³⁵

II. WORK DISRUPTIONS

While issuance of a large number of change orders, per se, does not appear to constitute a breach of the duty to cooperate, an excessive number of disruptive visits by government personnel may be such interference. The C.A.F.C. has expressly stated that the number of modifications, whether 950 or 525, issued on a complex contract is irrelevant.¹³⁶ Furthermore, Admiral H. G. Rickover has testified that it is not unusual to have 3,350 changes on a complex contract.¹³⁷ The Tenth Circuit has also decided a case involving more than 6,000 changes without finding a breach of the duty to cooperate.¹³⁸ Additionally, the ASBCA has held that the number of changes

ordered does not by itself, constitute a breach of duty, however, it may have a bearing on other grounds for recovery.¹³⁹ Whether a contractor can recover where there has been a significant disruption to its manufacturing contract as a result of the issuance of a large number of change orders remains open. In Air-A-Plane,¹⁴⁰ the court directed that a trial be held concerning whether issuing almost 1000 changes had disrupted the contractor's work. As the case was settled prior to trial, this issue was never resolved.¹⁴¹ Disruption has been found, however, where a change added over 200 percent to the cost of part of the work, although no such disruption was found where equitable adjustments of 170 percent were claimed.¹⁴²

Visitors to the contractor's work site can significantly disrupt operations. In SCM Corp.,¹⁴³ the ASBCA recognized the validity of the concept that an excessive number of Government visits may be a breach of contract. However, the board declined to find such a breach on the particular facts of the case; 1700 visitors within an 18 month period.¹⁴⁴ This finding casts doubt on the future value of this recovery theory as it appears to be a backwards step from the Board's previous position that 722 visitors within a 18 month period was an inordinate number of DCAS personnel which had an harassing effect upon the contractor.¹⁴⁵ Given the large number of

visits involved, yet a finding of no significant disruption, the practical validity of this concept is obviously questionable.

Interruptions at the work site by alteration of the physical facilities or through movement of Government personnel and material, have often resulted in contractor recovery. In American Household Storage Co. of Florida,¹⁴⁶ the contractor's performance was delayed by alteration work at the new office location of the United States Geological Survey as the premises were not ready for the contractor's activities on the date specified on the notice to proceed. The GSBCA held that the Government breached its contract when it interfered with appellant's performance by not having the premises ready on the specified date and allowed recovery for delay caused by subsequent adverse weather.¹⁴⁷ Unreasonable interference has also been found where the Government suspended the contractor's performance, by denying it access to the work site, so that academic activities and a season opener football game could be conducted.¹⁴⁸ Excess movement of aircraft in and out of a hanger, where the contractor was working on doors which had to be opened and closed for each transit has been held to constitute unreasonable interference.¹⁴⁹ The contract may, however, expressly permit a limited amount of such interference. In Vic Lane Construction, Inc.,¹⁵⁰ the contract permitted up to a two

week interruption in access to the work site to allow the Government to remove asbestos from the site. The Government exceeded this time limit when it took 28 days to remove the asbestos. The ASBCA allowed the contractor to recover its expenses for the period of the constructive suspension which exceeded 14 days, the contractually agreed amount.¹⁵¹

III. DIRECTING PERFORMANCE

By directing a particular manner of contract performance, the Government may unreasonably interfere with the contractor's activities. Giving specific directions on how to excavate, which results in the performance of noncontractually required work, is one such common occurrence.¹⁵² Directions to use noncontractually required equipment or to conform to safety standards not mentioned in the contract may also be a constructive change requiring an equitable adjustment.¹⁵³

Inconsistent directions which delay performance are compensable. In Don Cherry, Inc.,¹⁵⁴ the Government reasonably suspected the integrity of a concrete column as the contractor had neglected to give the notice required to allow inspection of the pour and had deviated in the past from specification mix requirements. However, the Government was dilatory and inconsistent where it initially

demanding that the contractor remove all the columns and renewed that extraordinary demand after seemingly agreeing to core samples. The ASBCA allowed the contractor to recover for its three day delay caused by the Government's unreasonable conduct.¹⁵⁵ However, the contractor must establish such conflicting directions by sufficient proof. Disputed allegations do not constitute evidence and cannot be accepted as proof of disputed facts.¹⁵⁶

Government direction to change the planned sequence of work may hinder the contractor. In James L. Patten,¹⁵⁷ the Government ordered the contractor to defer work under one contract so that it could be coordinated with work required under a later awarded contract. The Government had contemplated simultaneously burning slash on adjacent parcels of land. The IBCA found such direction to be a change as the contractor would have had to have been "clairvoyant" to have realized that coordination with a yet-to-be awarded contract was required.¹⁵⁸ Absent an express clause permitting such delay, this change in timing was improper.¹⁵⁹ Direction to continue pouring concrete rather than waiting until other behind schedule contractors completed their work, has also been found to be compensable where continued performance was more expensive than waiting out the delay.¹⁶⁰ Additionally, recovery is permitted in change of sequence cases where the Government alleges but

fails to prove that the change occurred as a result of an agreement.¹⁶¹

Where the contractor fails to prove such direction or that it was logical to provide such direction, no recovery is allowed. Lack of proof has prevented recovery where there was a lack of any credible evidence of such direction,¹⁶² the contractor's performance was not affected,¹⁶³ or the contractor failed to follow the directions given.¹⁶⁴ In Saylor Construction & Maintenance,¹⁶⁵ the contracting officer's representative provided monthly road maintenance assignments to the contractor. The contractor claimed interference and resultant inefficiencies with its operations as it was prevented from directing and prioritizing the work. The AGBCA rejected the contractor's claim, noting that as the Forest Service was the party to whom complaints of inadequate or blocked roads were made, it was logical for it to decide the work to be accomplished and the contract so provided for this direction.¹⁶⁶

IV. HIRING AND FIRING

Directions, by the Government to the contractor, to either hire or fire additional personnel, may be improper. In Optimal Data Corp.,¹⁶⁷ the Government directed the contractor to hire a full time project manager to

handle its computer operations workload. As a bidder could reasonably have understood that project manager duties and computer operations could be handled by one individual, a constructive change occurred. However, no compensation was permitted as vacancies in the number of required computer operators precluded the incurrence of additional costs by the contractor.¹⁶⁸ Compensation for directed hirings has also been denied where the Government could have terminated the contractor for default because of delinquent performance. In Davis, Smith, Carter & Rider, Inc.,¹⁶⁹ the Government requested that an Architect-Engineer consider employing an environmental consultant as the environmental critique he had included in a preliminary submission was deficient. The ASBCA reasoned that as it was unlikely that timely completion would have occurred but for the hiring of the consultant, this cost was not recoverable. Additionally, the Architect-Engineer failed to show that incurred costs exceeded that which would have been expended to successfully complete the contract.¹⁷⁰ Directed firings may also constitute an interference with the contractor's performance. Dismissal of a subcontractor has been found to have been improperly ordered where the grounds of incompetency were not supported by the evidence.¹⁷¹ Likewise, to arbitrarily order the dismissal of an employee delayed the contractor.¹⁷²

V. IMPROPER REMEDIES

The Government's choice of an improper remedy under the contract may constitute active interference. In Atlas Contractors, Inc.,¹⁷³ the contractor agreed to install an air distribution system. When confronted with evidence of contractual noncompliance, Atlas did not correct or replace the defective units as requested but instead, chose to argue that the units met contract requirements. Although the contract provided specific remedies for this circumstance, the Government instead, chose an alternate remedy, to redesign the unit and hold the contractor liable for these costs. As government action went far beyond remedies agreed upon by the parties, the contractor was entitled to an equitable adjustment.¹⁷⁴ The Government has also been held liable for breach of its implied duties where it terminates for convenience a contract without a Termination for Convenience clause, either actually or by operation of law.¹⁷⁵ Obviously, the Christian doctrine would incorporate this clause where it had been omitted but a regulation or statute required its inclusion.¹⁷⁶

VI. MISCELLANEOUS ACTS

Various other acts of the Government could hinder the contractor's performance. Both physical interference, such

as placing temporary displays in aisles which made cleaning more difficult,¹⁷⁷ and other disturbances, such as excessive noise from jet engines,¹⁷⁸ can interfere. It is also clear that the Government's flooding of the contractor's work site, either actively, to protect electrical power line poles or avoid delay of a dominant contractor's more expensive work, or passively, to prevent drainage from the work site,¹⁷⁹ can be a constructive change to the contract.

Failure of the contractor to prove increased costs, however, will prevent recovery. In Orbit Construction Co.,¹⁸⁰ the Government released excess water from a reservoir which had accumulated as a result of heavy rains. Although the contractor argued that this release aggravated a washout problem, the ENG BCA found that erosion had actually been reduced and that the washout problem resulted from the contractor's failure to follow the normal sequence of work and good construction practices. Thus, the contractor's claim was denied. Additionally, the contractor failed to prove any increased costs for labor and equipment inefficiency as a result of the water back-up situation. As the contractor failed to advance any evidence to support its claim, the board decided that any inefficiency must have been caused by the appellant's disorganized operation.¹⁸¹

VII. OTHER THAN THE CONTRACTING OFFICER

Actions by other Government parties, in addition to the contracting officer, can impede the contractor, resulting in Government breach of its implied duties. These parties may be either expressly or impliedly designated and their identities range from technical representatives to inspectors or even to other agencies. The first rule to remember, however, is that there is no liability for damages resulting from third party action, absent Government fault, negligence, or an unqualified warranty.¹⁸² In Xplo Corp.,¹⁸³ the contractor's personnel were illegally arrested by municipal police attempting to prevent blasting operations. The contractor argued that the Government breached its implied duties not to interfere even though the interference was caused by a third party, the City of Bayonne. The DOT BCA denied recovery finding none of the above three exceptions. In particular, no warranty of availability was found as the Government had never warranted site availability.¹⁸⁴ Warranty of site availability has been found, however, where Government drawings of storage work areas designated them as such without "the slightest hint" of any restriction on their use.¹⁸⁵

Parties other than the contracting officer may be either expressly or impliedly authorized to act for the

Government, with the Government incurring potential liability for their actions. In Albemarle Asphalt, Inc.,¹⁸⁶ the contracting officer expressly designated a refuge manager as the person with whom the work was to be scheduled. The refuge manager failed to allow the work to start on time resulting in 40 days of delay. The IBCA summarily rejected the Government's argument that the refuge manager had no authority to delay the work based on this express authorization and allowed the contractor the entire period of delay.¹⁸⁷ Express authorization for an expert has also been found where the specification required the contractor to consult with the expert. Consequently, the Government became liable for additional costs incurred in complying with the expert's erroneous advice.¹⁸⁸

Liability is also commonly imputed to the Government for the actions of technical representatives, inspectors, and other agencies. In Xplo Corp.,¹⁸⁹ directions by the contracting officer's technical representative to perform relief excavation resulted in a constructive change to the contract. Although the contract did not require that a relief trench be dug, a telegram and letters from the technical representative requiring either such a trench or an alternate proposal constituted such direction.¹⁹⁰ Directions of inspectors may also generate interference. Where an inspector insists upon an alternate method of performance when the contractor's method is sufficient, a

constructive change has been found.¹⁹¹ Finally, other agencies may interfere with the contractor's performance. In Nathan Kuhn,¹⁹² the contractor provided heating and cleaning services for an Armed Services recruiting office under a United States Army Corps of Engineers contract. The recruiting office's extended hours of operation resulted in additional heating and cleaning services in excess of those required by the lease. The ASBCA allowed the contractor to recover its extra costs, noting that the Corps of Engineers was obviously not prepared to require that the recruiting office confine its hours of operation to the contractual "normal Government work hours."¹⁹³ Liability has also been found under a GSA contract where the tenant agency refused the contractor access to its work site as it was dissatisfied with the quality of work on the painting contract.¹⁹⁴

VIII. LIMITATIONS ON RECOVERY

A. SOVEREIGN ACTS DOCTRINE

Even when the Government affirmatively interferes with the contractor's performance, the Sovereign Acts doctrine may prevent recovery. Long established case law clearly recognizes that, "[t]he United States as a contractor are not responsible for the United States as a lawgiver,"¹⁹⁵

or as phrased elsewhere, "that the United States as a contractor cannot be held liable directly or indirectly for the public acts of the United States as a sovereign."¹⁹⁶ In Hedstrom Lumber Co., Inc. v. United States,¹⁹⁷ the contractor's timber sales contract was terminated by the Boundary Waters Canoe Area Wilderness Act (Act) which was intended to preserve federal lands in their wilderness state for future public use and enjoyment. The contractor contended that the Act was not a sovereign act as it affected only a limited number of timber contracts in a defined geographical area. The Claims Court ruled otherwise, noting that termination of the timber sales contract pursuant to the Act was a sovereign act as the legislation was enacted in the national interest and affected a number of different timber contractors over a substantial geographical area as well as other commercial and recreational users.¹⁹⁸ Other cases finding a public act include the normal releasing of water from a flood control dam which washed out a contractor's water crossing¹⁹⁹ and issuing a directive which required the use of a specified stevedoring company as it applied to all vessels unloading at the designated port.²⁰⁰

In contrast, contractual acts have been found where the Government attempts to aid other contractors or to assume control of the project. Specific examples include instances where the Government, in order to permit another

contractor to work on a more expensive contract, closed flood gates causing the contractor's work site to flood;²⁰¹ constructed ditches to protect power line poles which resulted in the flooding of the contractor's site;²⁰² and assumed control over the contractor's manpower by ruling, without a valid basis, that a labor dispute existed with a contractor, thereby refusing to certify any workmen to the contractor's job.²⁰³ Even where a contractual act is not found the contractor may be able to obtain compensation, however, as it has long been a rule that the Government can agree by contract to pay for sovereign acts. The Court of Claims has expressly stated that the Government, "cannot enter into a binding agreement that it will not exercise a sovereign power, but it can say, if it does, it will pay you the amount by which your costs are increased thereby."²⁰⁴

B. ISOLATED INTERFERENCE/PROMPT RESPONSE

Lack of a material interference, i.e., mere isolated acts of interference or prompt corrective action taken in response to a contractor's complaints of obstruction constitutes a second limitation upon contractor recovery. In Cedar Lumber Inc. v. United States,²⁰⁵ the Claims Court stated that, "[n]o matter how unreasonable the delay by defendant, in order to recover the plaintiff must show

that the delay caused material damage ... [and that] minor errors or minor hinderances would not be sufficient to constitute breach."²⁰⁶ At issue was the Forest Service's liability for delay in furnishing design plans for the road construction portion of a timber sales contract. The court found a breach, reasoning that fault required to show a breach of the duty of cooperation will be presumed, absent evidence excusing or justifying the delay, and rejecting all of the Government's proffered defenses.²⁰⁷ Lack of materiality has been found where the contractor argued that the Government's failure to provide a required listing of time clocks and their respective locations in a clock maintenance services contract breached the contract. As the contractor had performed the same services for 13 years without such a list, no impact, much less materiality, was proven.²⁰⁸ Where the contractor fails to provide any evidence of direct impact on its operations, recovery will be denied.²⁰⁹

Material interference will not be found for mere isolated acts or where there has been a prompt Government response. The ASBCA has not allowed recovery where the contractor was inconvenienced or temporarily slowed only here and there during contract performance²¹⁰ as well as for an isolated instance of a lack of control, finding that the interference did not rise to the required level.²¹¹ A prompt Government reaction has also

prevented the development of materiality. In Biehler Painting Co.,²¹² the contractor contended that lack of cooperation concerning access to quarters became so aggravated that it could not continue to perform. In its opinion, the ASBCA found a few instances where quarters occupants had acted unreasonably. However, prompt action by appropriate base officials resolved these difficulties and the board was unable to find any unreasonable delays.²¹³

C. REPROCUREMENT

The Government's duty to cooperate extends to reprocurement contractors, although it may be extinguished for a contractor which has been terminated for default. In Ranger Construction Co.,²¹⁴ the contractor was awarded a contract by the Bureau of Prisons of the Department of Justice for the construction of a correctional facility. After a default termination, the contracting officer denied the contractor's application to appoint a consultant observer to monitor all aspects of the reprocurement work. The DOT CAB expressly recognized that the duty of cooperation and nonhinderance inheres in every contract, including completion contracts. Reasoning that the placement of this observer on the job site could furnish the basis for a claim of interference, the board declined

to so order.²¹⁵ Left unanswered is the nature and extent of any duty to cooperate with the original, but now defaulted, contractor during the reprocurement contract. Probably, since performance is over, the duty has been extinguished, and all that remains are normal procedural rights accorded to any contractor with a claim or dispute against the Government.²¹⁶

The Government's nonduty towards a terminated contractor should be contrasted with the situation where a contractor is performing corrective work. In Nanofast, Inc.,²¹⁷ the Government improperly terminated for default a manufacturing contract as the delivery date had been waived and the Government had refused to give the contractor an opportunity to make minor corrections. After the delivery date had passed, the Government, by its conduct, effectively exercised its election to continue the contract and allow late delivery. However, during this extension the Government failed to give the contractor a reasonable opportunity to correct any minor deficiencies or deviations found during testing. This breached the Government's duty to cooperate which the ASBCA recognized as extending through the time period for performance of corrective work. Specifically, the board held that this implied obligation required the Government to inspect equipment delivered by the contractor, to give the contractor an opportunity to present and explain the

intricacies of the equipment to the Government personnel testing it, and to allow a reasonable opportunity to correct minor deficiencies found by the Government.²¹⁸ Obviously, these same obligations would apply just as strongly during the original performance period.

CHAPTER 4

LACK OF COOPERATION

In addition to acts affirmatively interfering with the contractor's performance of contractual obligations, the Government's lack of cooperation may constitute a breach of its implied duties. Whether the Government's alleged lack of cooperation is reasonable depends upon the particular facts and circumstances of each case. The Court of Claims has stated that, "[w]hat is a reasonable period of time for the Government to do a particular act under the contract is entirely dependent upon the circumstances of the particular case."²¹⁹ In Cedar Lumber, Inc. v. United States,²²⁰ the Claims Court also stressed that it was specifically necessary to examine the magnitude of the failure to cooperate and the impact of that failure on the contractor's operations. The court illustrated its statement with a hypothetical case where Government delay in furnishing design plans may delay a contractor's start of construction, but be of insufficient magnitude to breach the duty to cooperate where the plans were furnished in sufficient time to allow construction to commence during the normal operating season.²²¹

I. REASONABLENESS - TIMELINESS AND INCREASED DIFFICULTY

Two key factors, promptness of Government action and the extent of increased difficulty of performance, figure into the reasonableness equation. A prompt and timely response generally results in a finding of reasonableness. Reasonableness has been found where the Government promptly directed a second contractor to make a needed area available to the appellant contractor for a sufficient amount of time to complete its work;²²² promptly moved blockages encountered by a contractor at a job site occupied by Government personnel,²²³ promptly took action to allow access to base quarters for renovation work;²²⁴ promptly restored utility services after an unexpected power shutdown;²²⁵ and acted reasonably promptly in the processing of a change order.²²⁶

Failure to take timely action generally constitutes failure to cooperate. Examples of untimely Government responses include the following: failure to issue timely delivery orders which hindered the contractor's ability to dispatch invoices and receive seasonable payment;²²⁷ late delivery of models needed for construction which resulted in delay of the overall project;²²⁸ late delivery of materials needed for a supply contract, which delayed completion of the contract, as well as unreasonable delays in accepting finished supplies;²²⁹ untimely delivery of

rough-in information on Government furnished equipment which required the contractor to defer interior construction work;²³⁰ delay in furnishing design plans which halted the contractor's progress;²³¹ failure to issue a timely notice to proceed²³²; taking 78 days to process a request for Government furnished property when the contract performance period was only 98 days;²³³ requiring 200 days out of a 400 day performance period to resolve security problems;²³⁴ and exceeding the 90 days allowed in the solicitation to process an alien worker's visa request.²³⁵

Government lack of cooperation may become unreasonable when such action increases the difficulty of performance. Various instances include: nondisclosure of information which hindered the contractor's performance by substantially altering the work's character and timing;²³⁶ subjecting the contractor to a "run-around" by requiring it to go from office to office;²³⁷ prohibiting common first article tests for two related contracts;²³⁸ interfering with construction by denying the contractor access to the site or delaying its access to materials;²³⁹ refusing to give a needed order and thereby, making progress impossible;²⁴⁰ failing to reassign a closer entrance gate to the contractor;²⁴¹ failing to communicate its desires or actions, thereby delaying issuance of a needed modification and approval of

a duty free certificate;²⁴² failing to seize a subcontractor's property which a prime contractor needed for continued performance;²⁴³ and losing a contractor's property which was essential for performance.²⁴⁴

Unreasonableness will not be found where the contractor fails to so prove, to give notice of increased difficulty, or waives the Government's failure to cooperate. In Udis v. United States,²⁴⁵ the contractor agreed to supply the Government with modified medical forceps. Samples provided by the contractor in accordance with the contract were tested and deemed unacceptable. Although the contractor ultimately complied with contract specifications, the contract was terminated for default and the contractor sued to overturn the default termination. The Claims Court held that the Government's failure to timely return the samples was not a breach of contract as the contract did not expressly require their return and their nonreturn did not prevent the contractor from complying with the specification.²⁴⁶ The contractor has also failed to prove breach where there was no evidence of any uncooperative acts by the Government towards the contractor and where actions by the Government in resolving the dispute were not so unreasonable as to be arbitrary.²⁴⁷

Failure to give notice of increased difficulty may preclude contractor relief. In Applied Devices Corp.,²⁴⁸

the contractor claimed that government actions during performance amounted to a lack of cooperation. Specifically, the contractor claimed that the Government required it to perform work beyond the terms of the contract. With one exception, that being a mylar claim for which the contractor received both a price increase and time extension, the contractor had never filed a claim to recover additional expenses. The ASBCA found that this failure to seek relief barred any later complaints.²⁴⁹

The contractor may also waive the Government's failure to cooperate. In Swinging Hoedads,²⁵⁰ appellant contracted with the Government for tree planting of approximately 497 acres. During contract performance the Government failed to deliver seedlings and shade carts to planting sites and the contractor failed to place written orders for planting stock at least 24 hours in advance of intended delivery time as required per the written contract. Instead, an ad hoc procedure developed where the Forest Service kept trees in a nearby cache from which the contractor would pickup needed trees and return any excess. The AGBCA stated it was obvious that contract provisions had been violated but that delays in asserting rights which prejudices the other party may waive those rights. As neither party had complied with the contract, the AGBCA concluded that those rights had been waived and that the parties should be left as they were found.²⁵¹

II. MULTIPLE CONTRACTORS

When the Government has to deal with multiple contractors special problems may arise. In general, the Government must exercise due diligence in these two contractor situations. Even when efforts directed towards preventing interference have been unsuccessful, however, a diligent attempt to overcome extraneous causes of delay has relieved the Government of any liability. In such circumstances, the Government's contracting personnel must have done, "all they could do to expedite," the other contractor's performance.²⁵² Reasonable Government efforts which excuse an interference have been found where the officer-in-charge did all he reasonably could do to hasten the prior contractor's performance;²⁵³ the Government took prompt action to obtain the other contractor's cooperation;²⁵⁴ the Government, "reasonably executed its duty to get timely completion," of the other contract;²⁵⁵ the Government exerted its best efforts;²⁵⁶ the Government did not allow any interference which could have been prevented;²⁵⁷ and when the Government was not responsible for work stoppages necessitated by unusually severe weather and a railway strike.²⁵⁸

In determining what is reasonable, the Government is not required to perform senseless acts. In Arvid E.

Benson,²⁵⁹ a site development contractor's performance was hindered by another contractor's delayed performance of related work. Appellant sought recovery from the Government for extra expenses incurred, alleging a violation of the Government's affirmative duty to cooperate. The ASBCA denied the contractor's claim, expressly rejecting any requirement that the Government terminate the second contractor for default since this would only have caused greater delay. Thus, the Government's actions were reasonable as it had undertaken all reasonable efforts to expedite the delinquent contractor's performance.²⁶⁰ The ASBCA has also stated that the Government is not required to perform a, "vain and futile act."²⁶¹ Recovery has been allowed for unreasonable delay, despite the Government's due diligence. In one example, diligent Government efforts excused 30 days of a 75 day delay, however, 45 days of delay were compensable because of the resultant impact on the contractor.²⁶²

Unreasonable conduct has been found where the Government fails to diligently seek performance from another contractor or gives inconsistent directions to different contractors. Numerous cases have allowed recovery where the Government failed to coordinate work among contractors.²⁶³ For example, in Kermit M. Anderson, Inc.,²⁶⁴ the Government had designated a source

of rock to be used by the contractor and by another firm. The contractor's performance was delayed by the other firm and although the Government was made aware of the delay, it only asked the other contractor when it might be out of the quarry. The AGBCA held that failure on the Government's part to do more constituted a constructive change, entitling the contractor to an equitable adjustment.²⁶⁵ In another case, unreasonable conduct was found where the Government took no action in response to a contractor's plea for assistance.²⁶⁶ It is also unreasonable for the Government to grant priority to one contractor at another's expense. In American International Contractors, Inc.,²⁶⁷ the Government failed to enforce a shipping agreement despite mismanagement, confusion, and inefficiency on the part of the shipper which resulted in excessively late deliveries and pilferage of, as well as damage to, a construction contractor's cargo. Despite notice of the shipper's unsatisfactory performance, the Government failed to seek improvements in service, but rather, actively supported the shipper. The ENG BCA found this conduct unreasonable and compensable as a breach of the Government's duty to cooperate.²⁶⁸ Other unreasonableness cases include instances where the Government gave priority to less efficient contractors,²⁶⁹ flooded a contractor's work site to avoid delaying a more expensive contractor's work,²⁷⁰ and

sought to defer work under one contract to coordinate it with work under a later-awarded one.²⁷¹

III. NOTICE TO PROCEED DELAYS

Unreasonable delay in issuing a notice to proceed may be a breach of the Government's duty to cooperate. Basically, the same rule has been used by the Court of Claims to decide both breach and Suspension of Work clause cases for these types of delay. Delay has been held unreasonable if the notice to proceed is not issued by an express date²⁷² or if not issued within a reasonable time when no date is stated.²⁷³ Where no time for issuance has been stated, the reasonableness of delay is dependent upon the reason for delay and the Government's ability to overcome the delay.²⁷⁴ Express notice of possible delay has been held to foreclose contractor recovery. In Jim Hall Contracting,²⁷⁵ the contractor claimed that the 40 days taken by the Government to issue the notice to proceed was unreasonable. The Government argued that as award was made 14 days after bid opening and the solicitation provided for a period of up to 60 days for the Forest Service to accept the bid, the 40 days taken to issue the notice to proceed after award was not unreasonable. The AGBCA accepted the Government's argument, reasoning that the contractor should have anticipated that award might not

be made until the end of the 60 day period and that as the notice to proceed was issued within this time frame, any delay was not unreasonable.²⁷⁶ Recovery has also been foreclosed for a 31 day delay where the solicitation provided that in the event of a bid protest, issuance of the notice might be delayed up to 65 days.²⁷⁷ In a case involving another bid protest, no express notice of a possible delay was required in order for the ENG BCA to conclude that any delay caused by responding to the protest was reasonable.²⁷⁸

Express provisions have also resulted in contractor recovery. In Eickhoff Construction Co.,²⁷⁹ the Government issued a notice to proceed on 13 February where the contract specifically provided that no delays for severe weather would be granted until 1 May if the contractor in its discretion chose to begin contract performance prior to that date. As April weather appeared favorable, the contractor made plans to commence work on 15 April. However, the Government's delay in readying the site resulted in its nonavailability until 1 May. The ASBCA found that the Government had unreasonably delayed the contractor as the contract specifically permitted an early start, dependent only upon weather conditions.²⁸⁰

Delay may be unreasonable where the Government issues the notice with one hand, but prevents commencement of performance with the other hand. In Edmonds Electric

Co.,²⁸¹ the contractor was required to notify each occupant of Government housing prior to beginning renovation work. After award and issuance of the notice to proceed, the Government announced that work could not begin until after all the occupants had been notified of the work schedule by publication in the base bulletin, which delayed the contractor's start by 14 days. The ASBCA found this delay unreasonable.²⁸² Finally, a recent case found unreasonable delay, even though an initial suspension of performance was reasonable, based on the economic impact of the contractor's claim. In M.I.T. Alaska,²⁸³ the contractor filed a \$36,614 claim one day prior to the expected issuance of the notice to proceed. The Government argued that this substantial claim, approximately 60 percent of the contract award, raised substantial questions as to whether the contract should be continued. The PSBCA agreed that economic feasibility questions justified the decision to withhold the notice. However, the board was not persuaded that the entire 14 day delay was reasonable and based on the effects of the delay on the contractor's operations, only allowed 7 days for reasonable delay.²⁸⁴

IV. SITE AVAILABILITY DELAYS

Delays in site availability may result in Government liability. The Government has been held responsible for

late site availability where there was Government fault, breach of an express warranty, or under the convenience rule analysis.²⁸⁵ Government fault can result from a breach of its implied duty to cooperate. One such instance occurred where the Government was aware of difficulties a contractor was experiencing in obtaining goods from a supplier yet issued a notice to proceed, subsequently issuing a higher priority order to the same supplier, which displaced the contractor's order even farther behind on back-order.²⁸⁶ Unreasonable delay as a result of Government fault occurs under a variety of circumstances. In P & A Construction Co.,²⁸⁷ the ASBCA stated that, "[w]hat is reasonable depends upon the cause of the delay, the duration, and the effects on appellant's operations."²⁸⁸ The board found unreasonable delay where the Navy's exclusive knowledge of a gate closing was not communicated to the contractor, which caused a delay and resultant loss of the appellant's subcontractor.²⁸⁹ Unreasonable delay has also been found where the Government took 219 days to find a solution to a problem with the floor of a hospital supply area²⁹⁰ and 200 days of a 400 day performance period to resolve security problems.²⁹¹ Conversely, premature issuance of a notice to proceed may result in a finding of unreasonable delay. Examples include issuing the notice 15 days prior to actual site availability²⁹² and issuing it with knowledge that

performance was presently impossible due to the presence of a prior stage contractor on the site.²⁹³

When the Government interferes with the contractor's sequence of operations, lack of cooperation is easier to find. The Government has been found liable for an eight day delay in turning over houses to a contractor with a sequential demolition plan²⁹⁴ and for a six day delay in assigning units under a mobile home renovation contract where the work was geographically scheduled.²⁹⁵

Delay may also become unreasonable when it extends beyond a reasonable period. In J.W. Bateson Co.,²⁹⁶ the contractor was delayed two and one-half months by Government inaction in relocating electrical lines. The GSBCA found a portion of the delay reasonable as some delay can be expected in any construction job, especially since the contractor only gave the Government ten days notice from when it needed the lines moved. The GSBCA concluded that, however, because of the "impairing effect" the lines had on the excavation schedule all delay beyond the first 30 days was unreasonable.²⁹⁷ Other instances of unreasonable delays include a denial of access to the worksite for 92 days,²⁹⁸ being denied access because of quality control complaints,²⁹⁹ and failing to assist a contractor to gain access when family housing occupants prevented entry.³⁰⁰ However, the Government is generally not required to successfully overcome extraneous causes of

delay in obtaining site access so long as it uses due diligence.³⁰¹

Reasonable delays may occur where there is a lack of Government fault, the contractor contributes to the delay, or the contractor fails to prove such fault. Some delays may be expressly permitted by contract. Reasonable delays have been found where the contract stated that the contractor would be required to leave the site from time to time,³⁰² a contract clause provided that compensation would only be available if the denial exceeded eight hours,³⁰³ and a letter agreement (even though not a formal modification) postponed access.³⁰⁴ Contractor fault also may justify denial of access. In G. Scofield & Sons (Rural) Pty. Ltd.,³⁰⁵ the contractor claimed that its debarment from base unfairly denied it site access. The ASBCA rejected the contractor's argument reasoning that the contractor had been at fault by wondering around in several unauthorized areas and that all the contractor had to do to be readmitted was to obtain the proper equipment for the job, which it never did.³⁰⁶ Lack of proof of unreasonable delays have also resulted in findings that a security clearance requirement was reasonable³⁰⁷ and that any delay in obtaining access resulted from the contractor's failure to complete earlier stages of the project and not from Government fault.³⁰⁸

V. CHANGE ORDER DELAYS

The Government may be liable for unreasonable delay in issuing a change order.³⁰⁹ Case law reduces the extent of delay considered reasonable when there is a considerable impact on the contractor because of the magnitude of the change³¹⁰ or when the Government has preexisting knowledge of the need for the change but fails to plan ahead.³¹¹ Even a very short delay may be held unreasonable; for example, a six hour delay by the Government in determining whether a change in the installation method for a partition should be undertaken has been held unreasonable.³¹² Delay is also unreasonable where the Government accepts a contractor's proposal after first rejecting it.³¹³ Commitments to other jobs which prevent the Government from promptly tackling a problem may result in a finding of unreasonable delay. In Richard P. Murray Co.,³¹⁴ a contractor was idled while the Government attempted to solve a soil problem. In dicta, the AGBCA determined that all delay above that actually resulting from working on the problem was, per se, unreasonable. Therefore, only two days, the actual time spent working on the problem, was reasonable and the contractor was compensated for all time in excess of that amount.³¹⁵

The Government is liable for delay resulting from negligently prepared specifications, even when they are not "defective" in the traditional sense. In Bromley Contracting, Inc.,³¹⁶ the Veterans Administration informed the contractor, during the preconstruction conference, that changes were forthcoming. The practical effect, was to order a deferral of the work as the only work to be performed under the contract was to be changed. This constructive suspension was unreasonable as it resulted from the Veterans Administration's negligent preparation of the specification, i.e., its failure to coordinate specifications with specifications of other related contracts, resulting in a conflict of specifications between several contracts. Although the specifications were not "defective" in the usual sense, the VABCA held that all delay was unreasonable, applying the same principle of relief as would apply to a true defective specification situation.³¹⁷

VI. INSPECTION DELAYS

A. INSPECTIONS

Government delay in inspecting the contractor's work may be unreasonable and the contractor has been allowed compensation where the Government failed to act in a timely

manner. Although overzealous inspections may hinder the contractor, Government delay in conducting an inspection may also be a breach when it represents a failure to cooperate. Additionally, unreasonable inspection delays of a contractor's goods may result in a constructive acceptance of the supplies with secondary consequences of overturning a default termination.³¹⁸ Thus, both overzealous as well as dilatory Government conduct can have unfavorable consequences for the Government.

Government fault has been found both for unreasonable delay in inspecting³¹⁹ and for providing improper test equipment.³²⁰ However, where the Government does not unduly delay its inspection, the contractor assumes the normal business risks. Thus, a contractor was denied compensation where lumber left uncovered for inspection, warped from being exposed to the rain, when the Government's inspection was not unduly delayed, as weather is a normal business risk of the contractor.³²¹ The Government is responsible for providing proper test equipment for non routine inspections. In Gloe Construction, Inc.,³²² the Government provided defective test equipment for use in the construction of waste water stabilization ponds. The ASBCA held that while ordinarily it is the contractor's responsibility to provide all needed test equipment, under this contract testing was not the contractor's responsibility,³²³ and therefore, providing

malfunctioning test equipment constituted Government interference.³²⁴

Not all delay is unreasonable. In two instances, delays to allow testing for defects have been upheld as reasonable. An eight day delay was upheld when testing for defects was promptly commenced.³²⁵ Delay to require that a contractor submit a proposed corrective plan has also been upheld where a contractor's initial assessment and remedy of a problem had proved inadequate.³²⁶

B. INSPECTORS

Unavailability of Government inspectors may unreasonably delay the contractor. The Government may be required to conduct acceptance testing on the same day it is requested. In Darwin Construction Co.,³²⁷ the Government failed to conduct a final inspection on a construction project until 19 days after it had been requested. Reasoning that the Government failed to show any reason why it could not have conducted the inspection on the day it was requested, the ASBCA found all 19 days unreasonable.³²⁸ Similarly, where the Government inspected the contractor's work on the same day it was requested, the GSBCA found that the Government had demonstrated that it had not delayed final inspection.³²⁹ Using a similar line of reasoning, the

Court of Claims has also found unreasonable a 72 hour notice provision to permit observation of acceptance tests by Government inspectors.³³⁰ Government fault typically results in liability. Both short working hours for government inspectors³³¹ and a shortage of inspectors³³² have resulted in contractor recovery. Particularly important in the shortage case was a finding that the delay was not caused by the volume or complexity of the review and that a total delay of 19 days was involved.³³³

However, each case must be judged on its individual circumstances. Noncompensatory delays have been found where the Government could not have been expected to keep inspectors on an island throughout a two and one-half month period where the contractor's submissions were made in a piecemeal fashion.³³⁴ Compensation has also been denied for other reasonable delays. In Stephenson Associates, Inc.,³³⁵ a seven day delay in the contractor's work schedule resulted when the government inspector was sick one day and was only able to work on the project several hours per day for most of the next six days. The Government argued that the contractor had no right to expect that the inspector would devote his entire time to the inspection of its work. The GSBCA agreed, reasoning that although the Government could have been more cooperative, the delay was not unreasonable.³³⁶ A one

day delay has also been excused when it was due to an unforeseeable illness and testing resumed promptly thereafter.³³⁷

VII. GOVERNMENT PROPERTY - DEFECTIVE OR UNTIMELY

The Government's delivery of late as well as defective property breaches its obligation to cooperate. Recovery is routinely allowed for defective Government furnished property.³³⁸ However, the provisions under which the property is furnished may prevent recovery. In Dewey Electronics Corp.,³³⁹ the Government furnished the contractor two automatic weather stations for use in the manufacture of like weather stations. Throughout contract performance the contractor continually complained of "slippages" because of defects in the furnished equipment and brought such a claim before the Board. However, the ASBCA rejected the contractor's argument, reasoning that the stations were suitable for their intended purpose as a "design standard" and that any malfunctions did not detract from this use.³⁴⁰ There is also no legal distinction between whether the Government or its supplier provides the material. The Government is liable for breach of its implied duties if its supplier furnishes defective material such as an incompatible computer application program.³⁴¹

The theory that late delivered Government furnished property breaches the Government's obligation to cooperate is well-established.³⁴² Property is untimely furnished if it hinders the contractor's on time completion. In Finesilver Manufacturing Co.,³⁴³ the contractor continually lacked the material needed to make trousers ordered by the Government because of its failure to deliver. This failure breached the Government's obligation to cooperate even though there was no delivery schedule for the required fabrics as the Government had an implied obligation to deliver the fabric so that the manufacturer could meet the contract delivery date.³⁴⁴ The phrase, Government furnished property, even includes the delivery of information. The untimely delivery of rough in information on Government furnished equipment which caused the contractor a 13 day delay has been held to breach the Government's obligation to cooperate.³⁴⁵

VIII. JOB SITE OCCUPANCY

Government acts occurring during its occupation of a building under renovation may constitute a lack of cooperation. In Able Contracting Co.,³⁴⁶ the contractor was denied total access by the occupants of a building for four hours which resulted in a compensable half day delay. The ASBCA allowed recovery based upon the failure of the

Government to control the behavior of its tenants so as to ensure access to the buildings.³⁴⁷ The contractor assumes the risk, however, of temporary stoppages which are promptly resolved and even of some work stoppages which are not so temporary. In L.T.D. Builders,³⁴⁸ the contractor agreed to renovate an active welding and machine shop. Usually obstacles to contractor performance were immediately removed, however, on two occasions materials could not be moved promptly. The ASBCA denied the contractor any recovery, reasoning that as the contractor should have expected some minor problems because of the occupancy and had only experienced such minor inconveniences, there was no real impact on its progress.³⁴⁹ What the board seems to be saying is that minor delays are to be expected under continued occupancy conditions and that absent unreasonable delays under these contracted for circumstances, the Government does not breach its duty to cooperate. Other reasonable circumstances include those encountered from normal traffic through a functional hospital jobsite³⁵⁰ and that caused by a patient in a hospital room where all evidence indicated that work proceeded on schedule.³⁵¹

IX. FUNDING DELAYS

Delayed funding, as a consequence of Government fault, may result in the breach of implied duties. Fault will be found where the Government wrongfully delays in providing funds to the contractor. It is clear that there is no breach where Congress fails to appropriate funds³⁵² or the President impounds the funds before they can be used.³⁵³ However, a breach has been found where the Government approves a construction plan requiring a certain level of funding, yet subsequently, fails to seek such funding and neglects to so inform the contractor.³⁵⁴ Unreasonable delay in providing funds, such as a five and one-half month hiatus while the contractor was on standby awaiting funding, has been held to constitute a breach.³⁵⁵ However, perfection is not required in the provision of funding. In SCM Corp.,³⁵⁶ the contractor alleged that incremental funding interfered with its production effort. The ASBCA concluded that the, "appellant, somewhat naively, expected 'perfect' contract administration," a goal not required of either party.³⁵⁷ Even though the contractor may have had to operate with less than maximum efficiency, the board decided the Government could not be faulted for insisting on phase completion prior to continued production.³⁵⁸ Finally, Government funding priority for other contracts may be

compensable where it causes cost overruns. In Gunther & Shirley Co.,³⁵⁹ the contractor agreed to slow his performance as a result of a constructive deceleration order and extra costs resulted. Accordingly, the ENB BCA determined that the contractor was entitled to an equitable adjustment.³⁶⁰ Left unanswered was the question, whether preferential funding of other contractors standing alone, in the absence of a deceleration order, would have been compensable. Resort to reasoning employed by the Court of Claims in L.L. Hall Construction Co. v. United States,³⁶¹ that the Government cannot give priority to less efficient contractors, leaves little doubt, however, as to the expected answer that any such increased costs would have resulted from the Government's breach of its duty to cooperate.

X. APPROVALS - REASONABLENESS, DENIALS, AND DELAYS

Throughout contract performance, the Government may be called upon to exercise its approval authority. Approval by the Government is typically needed for any submittals required by the contract, such as shop drawings or paint schemes, subcontractor selections, and first articles. The contracting officer's approval authority, although discretionary and often expressly unregulated, is subject to the implied duty of cooperation. The Government may

breach this duty where it unreasonably denies or delays approvals required by the contract.

A. REASONABLENESS

While a contracting officer has discretion on how to act, "it is not unbridled and it must be exercised in a fair and reasonable manner, not arbitrary and capricious, and always in the best interest of the Government."³⁶² Reasonableness is fact specific and depends upon the circumstances. Although most decisions appear to be well supported, at times, any barely plausible rationale may suffice. For example, denial of a security pass was not found arbitrary where the individual for whom approval was sought had falsified documents and the area to which access was sought was subject to terrorist attack as it contained arms storage rooms.³⁶³

Unreasonable consideration of approvals, which breaches this duty, can occur under various circumstances. For example, in P. & A. Construction Co.,³⁶⁴ the Government took an unreasonable amount of time to review a contractor's quality control plan, claiming that it failed to meet administrative prerequisites. However, the ASBCA rejected the Government's contention, ruling that as the plan had been complete when submitted, the Government was under a duty to complete the approval process within a

reasonable time, as no time period had been specified. As the actual approval time was unreasonable, the Government had to assume responsibility for the subsequent delayed start of work which had caused the appellant to lose its earthwork subcontractor and incur additional costs.³⁶⁵

Reasonable Government action is likely to be found where the contractor's submittals are different than contractually required. Delay has been found reasonable where the submittals differed from contract requirements;³⁶⁶ did not include all required matters;³⁶⁷ were untimely and discrepancies only slowly clarified;³⁶⁸ were piecemeal, deficient, and in need of numerous revisions;³⁶⁹ were incomplete with deviations;³⁷⁰ was deficient;³⁷¹ and required specified corrective actions.³⁷² In one case, subsequent contractor revisions to the submittals were used as evidence to prove that defects existed in the original submittals. In Murphy Bros.,³⁷³ the contractor continually revised its drawings, per Government direction, without objection. The DOT BCA decided that the contractor would not have voluntarily initiated nor acquiesced in the revisions unless it genuinely believed deficiencies existed.³⁷⁴

Failure of the contractor to state the reason for a requested substitution may increase the period of time considered reasonable for the Government's review. In

Tenaya Construction,³⁷⁵ the ASBCA allowed the Government thirty-three days to disapprove, then accept, a requested substitution where approval was given only four days after the reason for the request was finally stated. That the literature submitted with the requested substitution did not indicate compliance with the specification³⁷⁶ may have been crucial as it has commonly been held unreasonable to accept previously rejected items.³⁷⁷

Reasonableness may be found based upon contract language, actions of the contractor, and the contractor's inability to prove unreasonableness. The contract may determine what is a reasonable period of time. The Government has not been liable for delay when it acted upon a Value Engineering Change proposal within the 45 days permitted by contract clause.³⁷⁸ However, fault has been found where the Government exceeded the ten days allowed for first article approval³⁷⁹ and the thirty day period for approval of a first article test report.³⁸⁰ It is also clear that a mere late submission by the contractor does not extinguish the Government's duty of cooperation as numerous cases have so held.³⁸¹ Such delayed submittals may result in a reasonable period of time for Government action being rather lengthy. In one instance, the contractor's piecemeal submissions over a seven month period justified a concurrent prolonged approval time.³⁸² The approval consideration period may also be

reasonable when the contractor fails to prove unreasonableness. Lack of proof may occur when the contractor's evidence is unworthy of belief;³⁸³ only minor delays resulted from refusing to give the contractor a key;³⁸⁴ or concurrent delay prevented recovery.³⁸⁵

B. DENIAL

In denying an approval, the Government may have taken unreasonable action. For the Government to deny approval of a method of performance permitted by the contract is unreasonable. Unreasonable denials have occurred when the Government refused to approve a preproduction article which performed as well as the Government furnished model;³⁸⁶ refused to permit use of an item equal to the specified item in a contract with an "or equal" clause;³⁸⁷ and refused to approve an alternate method of performance which satisfied contract specifications.³⁸⁸ It has also been found unreasonable for the Government to condition approval of the progress schedule upon the contractor's performance of work in a particular sequence.³⁸⁹

Unreasonable denials can occur in the subcontractor area. In Max Jordan Bauunternehmung v. United States,³⁹⁰ the contractor's desired subcontractors were repeatedly disapproved by the contracting officer. The Claims Court upheld both the disapprovals and the direction by the

contracting officer to select one of four previously qualified subcontractors. The court reasoned that disapproval was not arbitrary as it was based upon the subcontractors' failure to meet specified qualifications and that because of time limitations the contracting officer finally had no choice but to direct the use of a qualified subcontractor.³⁹¹ In another case, disapproval of a subcontractor was found not to be arbitrary where the Government's reference check disclosed that three contractors were pleased with the subcontractor's work while four others would not recommend the company.³⁹² Unreasonable disapprovals have been found, however, where the subcontractor's performance was not irresponsible³⁹³ and where the contracting officer refused to permit a substitution when the original subcontractor refused to perform at its initial price based upon the fact that its initial price had been given over the telephone rather than in writing.³⁹⁴

Acceptance following a previous rejection is usually unreasonable. Such delay has been found unreasonable where the Government accepted the contractor's initially rejected change proposal for the repair of a collapsed wall,³⁹⁵ approved an initially rejected design for hoods and duct work,³⁹⁶ and allowed the use of pedestal hoods to attach elevated flooring to foundational floors after initially prohibiting such an arrangement.³⁹⁷ The reasonableness

of post-rejection acceptance was impliedly condoned in one instance where the contractor failed to give a reason for its request. Under the circumstances this was acceptable, as the reason, the unavailability of the specified material, greatly influenced the subsequent approval of the requested substitute.³⁹⁸

Various Government acts may result in unreasonably denying needed Government approvals. "Or equal" decisions may be unreasonable. Unreasonableness has been found where the Government refused to approve an equal material,³⁹⁹ work equal to that previously accepted,⁴⁰⁰ and items of equal quality and performance.⁴⁰¹ Government errors may also result in unreasonable disapprovals, such as the incorrect rejection of the contractor's payment and performance bonds where the Government had improperly added the amount of the bid bond to those above.⁴⁰² Unreasonable disapproval of shop drawings has also occurred where the Government directed a constructive change to the contract necessitating that the drawings be modified to show the new method of assembly for elevator cabs.⁴⁰³

C. DELAYS

Delays in giving a Government approval may be unreasonable. Delays in approving methods of performance have been found unreasonable where the contracting officer

took more than two days to approve a correct solution for hanging light fixtures in an aircraft nosedock⁴⁰⁴ and approximately one week to approve a contractor's request to use a two-step procedure to install a roof.⁴⁰⁵ Delays in approving first articles under a contract containing no "First Article Testing" clause⁴⁰⁶ and in exceeding the 10 day limit for first article approval under such a clause have been held unreasonable.⁴⁰⁷ Likewise, delays in approving a contractor's quality control plan where it was properly submitted and complete⁴⁰⁸ as well as in approving shop drawings may be unreasonable.⁴⁰⁹ Other unreasonable delays include a delay of almost two months in approving samples where the contractor had written that approval was urgently needed,⁴¹⁰ taking more than 30 days to approve purchase of a foreign product under the Buy American Act,⁴¹¹ and exceeding 30 days to approve a contractor's claim for the cost of removing defective fill materials.⁴¹²

CHAPTER 5

CONCLUSION

Long established common law precedent, the implied promise of one party not to hinder or obstruct the other, serves as the basis for the Government's duty to cooperate with the contractor and not to hinder it during contract performance. Breach of this obligation commonly results in recovery of an equitable adjustment by the contractor under either a constructive change or constructive suspension theory. However, determining whether there has been a breach can be a difficult task as each case must be decided on its peculiar facts, the magnitude of Government fault required before allowing recovery is uncertain, and the broad scope of the implied promise complicates application of other traditional recovery theories.

In its working relationship with the contractor the Government must avoid a destructive breakdown in relations with the contractor while still ensuring that it obtains its contractual entitlements. Although cooperation is especially critical in large and complex contracts, the Government is not required to make the work easier and has no duty to supervise a contractor's performance. Neither is it required to assist a contractor's early completion. However, the Government may not knowingly ignore contractor deviations during contract performance, hinder a

contractor's early completion, or unduly pressure a contractor to complete performance. A contractor is also generally responsible for its own finances, although special considerations may come into play for small businesses in the above areas.

A breach of the implied obligation not to hinder performance can occur under numerous circumstances where the Government actively interferes with the contractor's performance. Various Government actions, such as overzealous inspecting, through multiple or improperly conducted inspections; interrupting scheduled work performance by issuing disruptive change orders, too frequently visiting the work site, or interfering with performance; directing the manner of performance with specific or inconsistent directions; controlling contractor personnel assessments and terminations, choosing improper contract remedies, as well as other miscellaneous acts can hinder the contractor. Not only might the contracting officer be involved, but technical representatives, inspectors, and other agencies could actively interfere. However, various limitations, such as the Sovereign Acts doctrine; lack of materiality such as the fact that the interference was only an isolated incident or that the Government promptly resolved the situation; as well as the on-scene arrival of a procurement contractor, may

preclude a contractor from recovering for any such acts of active interference.

Lack of cooperation may breach the Government's duty to cooperate. Whether the Government's actions were reasonable depends upon the promptness of its actions and degree of increased difficulty of performance for the contractor. Unreasonableness may, however, not be found where the contractor fails to so prove, to give notice of increased difficulty, or waives its objections. Unreasonableness can occur in a variety of circumstances. In two contractor situations, due diligence by the Government generally relieves it of liability absent unreasonable delay. Notices to Proceed must be issued by any express date or within a reasonable time where no date is stated. Site availability may also be an issue where the Government was at fault, breached an express warranty, or delayed for its own convenience. Unreasonable delays in issuing change orders, conducting inspections, or in furnishing required equipment have also resulted in Government liability. However, where the contractor is on notice that buildings are to be occupied during renovation work, minor delays are considered part of the bargain. Additionally, agency, but not presidential or congressional, fault in providing required funding breaches this duty, although perfection is not the standard by which compliance is measured. Finally, unreasonable action in granting required approvals is actionable.

FOOTNOTES

1. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 1296 (3d ed. 1961 & Supp. 1979).

2. See *Bateson-Stolte, Inc. v. United States*, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959)("[i]t has been held for generations that a party to a contract may not interfere with performance by the party to be charged and still enforce the letter of the contract"). This implied promise remains in effect today. See *S.A.F.E. Export Corp., ASBCA 29333*, 85-2 BCA 18,138 (1985)(implied condition that Government not hinder the performance of S.A.F.E. by arbitrarily denying access to the installation). Not all nonfederal contracts contain this duty. *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983)(implied covenant that neither party may act to injure the others' rights is contrary to Texas' adversary system and will not be adopted in Texas).

3. 108 Ct. Cl. 70, 69 F. Supp. 409 (1947).

4. *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U.S. 264, 274 (1884)(prevention of performance terminates contract); *United States v. Peck*, 102 U.S. 62 (1880)(extra compensation allowed where contractor forced to cut wood two miles farther from where contract allowed).

5. 102 U.S. at 95. Even when contract performance is not prevented, but merely delayed, the Government is liable for damages resulting to the injured party. *United States v. Smith*, 94 U.S. 214 (1877)(the law implies that the Government will not unnecessarily interfere).

6. See generally *Hoel Steffen Constr. Co. v. United States*, 231 Ct. Cl. 128, 684 F.2d 843 (1982)(contracting officer's bad faith in disapproving substitute subcontractor constituted breach of the implied duty to cooperate); *Commerce International Co. v. United States*, 167 Ct. Cl. 529 (1964)(Government's ever-present obligation to carry out its bargain reasonably and in good faith relates to its obligation of reasonable cooperation). U.C.C. 1-203 provides that "every contract or duty" carries with it an obligation of good faith in its performance or enforcement. This Uniform Commercial Code obligation applies to all subjects within the field of Government contracting not specifically addressed by statute or regulation. See, e.g., *Reeves Soundcraft Corp., ASBCA 9030*, 1964 BCA 4317 (1964). Additionally, courts and boards look to the Uniform Commercial Code as evidence of modern contract law. *Northern Helix Co. v. United States*,

197 Ct. Cl. 118, 455 F.2d 546 (1972)(court explicitly recognized authority and relevance of the Uniform Commercial Code). The implied duty of good faith and fair dealing also runs both ways. J.C. Mfg., Inc., ASBCA 34399, 87-3 BCA 20,137 (1987)(contractor's failure to notify Government of mistake until 14 months after discovery breached its implied duty of good faith and fair dealing.

7. The present Default (Fixed Price Supply and Service) clause at FAR 52.249-8 reads:

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

The Default (Fixed-Price Research and Development) clause at FAR 52.249-9 is identical while the words, "of the Contractor's right to proceed," have been inserted after "termination" in the Default (Fixed-Price Construction) clause at FAR 52.249-10. This conversion principle was first announced in John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F.2d 438 (1963), cert. denied, 377 U.S. 931 (1964)(Government action preventing a contractor's continued performance would be adjusted under the Termination for Convenience clause).

8. Darwin Constr. Co., ASBCA 32500, 86-3 BCA 19,295 (1986)(liquidated damages set aside where delay was a result of the Government's failure to inspect work until nineteen days after inspection had been requested); Xplo Corp., DOT CAB 1241, 86-2 BCA 18,866 (1986) (Government not allowed liquidated damages where it unreasonably delayed in providing needed data).

9. Kahn Communications, Inc., ASBCA 27461, 86-3 BCA 19,249 (1986)(Government's repeated failure to properly test contractor's units and its insistence upon additional units constituted a material breach of the contract which extinguished the contractor's duty to proceed); Brand S. Roofing, ASBCA 24688, 82-1 BCA 15,513 (1981)(three month Government delay in informing contractor of performance defects greatly increased performance costs, constituted a material breach, and justified contractor's failure to proceed).

10. Arden Eng'g Co., ASBCA 24829, 83-2 BCA 16603 (1983)(three month delay by the Government in inspecting paint work unreasonable; failure to reject within a

reasonable time frame constitutes constructive acceptance).

11. Commerce Int'l Co. v. United States, 167 Ct. Cl. 529, 536 (1964)(no breach of implied duty to cooperate from a mere Government delay in furnishing work materials where the contractor was aware from the onset of the contract of the possibility of delays). Specifically, both the magnitude of the Government's failure to cooperate and the impact of that failure on the contractor's operations must be examined. Lewis-Nicholson, Inc. v. United States, 213 Ct. Cl. 192, 199, 550 F.2d 26, 29 (1977). Minor errors would not constitute a breach. Id.

12. In Shipco Gen., Inc., ASBCA 29206, 29942, 86-2 BCA 18,973 (1986), the contract specifically required that the Government assist the contractor if it encountered uncharted utility lines. Such obligations have also been assigned to the contractor. General Railway Signal Co., ENG BCA 4250 et al., 85-2 BCA 17,959 (1985)("Contractor shall fully cooperate with such other contractors and Authority employees ... [and] shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Authority employees"); Kermit M. Anderson, Inc., AGBCA 82-227-1, 84-3 BCA 17,684 (1984)(contractor's express duty to cooperate not excuse Government's failure to coordinate work); Line Power, Inc., ASBCA 27317, 83-1 BCA 16,253 (1983)(whether a particular act was within the scope of a contractor's obligation to "fully cooperate" is dependent upon the entire contract).

13. Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649 (1970)(as implied duties are inferred from surrounding circumstances there can be none which contradict express duties). In one unusual instance implied duties were held to have been violated where express obligations were met. In Eichof Constr. Co., ASBCA 20049, 77-1 BCA 12398 (1977), the Government was found liable for an unreasonable nine day delay in issuing a notice to proceed despite the fact that it was issued within the express thirty day time period allowed. Crucial to this decision was contract language which specifically permitted an early start dependent only upon favorable weather. Liability attached when favorable weather resulted but the Government was not ready to proceed.

14. See Fletcher & Sons, Inc., ASBCA 30895, 85 3 BCA 18,506 (1985)(Government not liable for any delay as it acted within the 45 days allowed it under the Value Engineering Change Proposal clause).

15. See Wood et al. v. United States, 258 U.S. 120 (1922)(express provision exempts the Government from liability); Wells Brother Co. v. United States, 254 U.S. 83 (1920)(Government not liable for delay because of exculpatory provision); Gilbane Bldg. Co. v. United States, 166 Ct. Cl. 347 (1964)(other contract provisions relieved the Government of warranty for site availability).

16. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 212 (2d ed. 1985).

17. Id. at 305.

18. Id. at 898; 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 1295 (3d ed. 1961 & Supp. 1979). "Breach of contract" was a term of art which referred to contractor claims of alleged Government failure to perform obligations for which no relief was available under the contract. The claim, therefore, fell outside of the scope of the then existing disputes process. E.g., Globe Eng'g Co., ASBCA 23934, 83-1 BCA 16,370, mot. for reconsid. denied, 84-1 BCA 16,941 (1983).

19. 41 U.S.C. 601 et seq. (1986). As all claims "relating to a contract" are subject to this disputes procedure and breach of contract claims are related to the contract, contractor claims of Government failure to perform required duties are covered by this statutory disputes process. E.g., Tefft, Kelly & Motley, Inc., GSBGA 6562, 83-1 BCA 16,177 (1982), mot. for reconsid. denied, 83-1 BCA 16,279 (1983). Continued adherence to the constructive changes doctrine is likely. See Johnson & Son Erectors, ASBCA 24564, 81-1 BCA 15,082 at 74,599 (1981), aff'd, 231 Ct. Cl. 753 (1982)("assuming that the evidence adduced is sufficient to establish entitlement we would find entitlement under the contract and not outside of it. It has long been the policy of this Board to seek a remedy under the contract. The constructive change doctrine is, perhaps, the foremost example of our commitment to providing relief under the contract whenever it is possible to do so").

20. Industrial Research Assocs., Inc., DCAB WB-5, 68-1 BCA 7069 (1968)(change element satisfied where actual performance goes beyond minimum contract standards; order element requirement met where Government directs above work).

21. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 306 (2d ed. 1985). For applicable case law support see Cedar Lumber, Inc. v. United States, 5

C1. Ct. 539, 550 (1984)(failure to provide plans and drawings was unreasonable conduct constituting fault). Government intent to harm the contractor is not required to support a finding of fault. *George T. Johnson v. United States*, 223 Ct. Cl. 210, 618 F.2d 751 (1980)(well intentioned but legally erroneous denial of essential funds satisfies requirement for finding of Government fault; bad faith not required).

22. Boards of contract appeals developed the doctrine of constructive suspensions of work. *John A. Johnson & Sons, Inc.*, ASBCA 4403, 59-1 BCA 2088 (1959), aff'd, 180 Ct. Cl. 969 (1967)(contracting officer's nonissuance of suspension of work order not necessarily fatal to contractor's case); *Guerin Bros.*, WDBCA 1551 (1948)(where contracting officer had duty to issue order suspending work, board will treat as done that which should have been done).

23. *Cedar Lumber, Inc. v. United States*, 5 Ct. Cl. 539, 550 (1984)(failure to provide plans and drawings was unreasonable conduct constituting fault); *Franklin L. Haney v. United States*, 230 Ct. Cl. 148, 676 F.2d 584 (1982)(Government responsible for damages caused by frequent changes to design and unreasonable approval delays).

24. FAR 52.212-12 SUSPENSION OF WORK (APR 1984). This mandatory clause applies to fixed price construction contracts. Constructive suspensions for other than fixed price construction contracts are covered by FAR 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984), which contains substantially similar prioritizing language, "for which an adjustment is provided or excluded under any other term or condition of this contract."

25. *Burl Johnson & Assocs.*, ASBCA 11760, 68-2 BCA 7227 (1968)(Government delay providing off-site utilities compelled contractor to perform work in a different manner); *Mech-Con Corp.*, GSBCA 1373, 65-1 BCA 4574 (1964)(postponement of part of work resulting from contracting officer's order to change the sequence of work found to be a change to the contract requirements); *Carpenter Constr. Co.*, NASA BCA 18, 1964 BCA 4452 (1964)(directive requiring the contractor to work intermittently were constructive change orders). This preference benefits the contractor as relief under the Changes clause allows profit as part of the adjustment and compensation permitted for both reasonable and unreasonable delay. Compare FAR 52.243-1 CHANGES FIXED PRICE (APR 1984) and 52.243-4 CHANGES (APR 1984) with FAR 52.212-12

SUSPENSION OF WORK (APR 1984) and 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984).

26. Piracci Constr. Co., GSBCA 3477, 74-2 BCA 10,800 (1974)(relief under the Suspension of Work clause not precluded where contractor could claim under either the Changes or Suspension clauses).

27. Gunther & Shirley Co., ENG BCA 3691, 78-2 BCA 13,454 (1978)(Board's judgment that some of the contractor's excess costs were delay costs compensable under the Suspension of Work clause while other costs were for extra and changed work and should be treated under the Changes clause).

28. R.G. Beer Corp., ENG BCA 4885, 86-3 BCA 19,012 at 96,026 (1986)("to the extent that the changes or other segregable claim events have delaying effects unrelated to infusion of additional work or actual performance of the changed work, compensation for such discrete events generally should be sought under the "Suspension of Work" clause"); see, e.g., Vic Lane Constr. Co., ASBCA 30305, 85-2 BCA 18,156 (1985)(delay pending issuance of change orders); Excavation Constr., Inc., ENG BCA 3858, 82-1 BCA 15,770 (1982)(66 day delay prior to issuance of notice to proceed entirely unreasonable).

29. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 334 (2d ed. 1985).

30. Automated Servs., Inc., EEOC 2, 81-2 BCA 15,303 (1981)(Government breached its implied duty to communicate by failing to inform the contractor that its proposed system would have to be extensively modified; this nondisclosure of superior information hindered contract performance).

31. ASBCA 17717, 76-1 BCA 11,851 (1976).

32. Id. at 56,718. The ASBCA found that the hard arm's length negotiating position assumed by the Government with regard to disclosing the delivery dates for the hull steel was inappropriate given this partnership relationship. Id. at 56,720 1.

33. Subparagraph (a) of the Government Furnished Property clause in the contract, DAR 7 104.24, required the Government to timely deliver the hull steel so that the contractor could meet the contractual vessel delivery dates. Id. at 56,679, 56,720. When the Government

determined that it was unable to make timely delivery, it had a clear duty to so state. Id. at 56,721.

34. G.W. Galloway Co., ASBCA 16656, 73-2 BCA 10,270 at 48,500 (1973), mot. for reconsid. denied, 74-1 BCA 10,521 (1974)(contrast in inspection levels not irrelevant; tends to show that appellant not afforded degree of cooperation afforded most other Government contractors).

35. ASBCA 20582, 76-2 BCA 11,972 (1976).

36. Id. at 57,379. Most of the Government delay appeared to result from relocation of the Naval Air Engineering Center (NAEC), which was responsible for reviewing deviation requests. This relocation, however, did not reduce the Government's obligation to respond to each request in a timely and reasonable manner. Id.

37. G. Schofield & Sons (Rural) Pty., ASBCA 24290, 85-1 BCA 17,843 (1984). Although the contractor argued that its dispute with the Government should be arbitrated by the Painters' Registration Board, the contract "Disputes" clause provided detailed procedures to follow in the event of a disagreement between the parties. In any event, the Painter's Registration Board's unwillingness to conduct an investigation rendered the contractor's argument academic and of no consequence. Id. at 89,306. For a general discussion of a contracting officer's authority, see Reifel, Bastianelli, Contracting Officer Authority, BRIEFING PAPERS 86-4 (Mar. 1986).

38. G.W. Galloway Co., ASBCA 17436, 77-2 BCA 12,640 (1977)(close surveillance and inspection of contractor's production efforts throughout contract performance, without apparent justification, justifiably characterized as "nit-picking").

39. Maintenance Eng'rs., ASBCA 23131, 81-2 BCA 15,168 at 75,068-9 (1981)(claim of harassment not supported by inspector's outburst and abrupt departure from meeting).

40. Mann Constr. Co., ASBCA 76-111-4, 81-1 BCA 15,087 (1981)(statements concerning personality clashes, dissension between Government and contractor personnel, overzealous attempts to protect Government interests, and derogatory remarks by inspectors could result in a finding of unreasonable inspections).

41. G. Scofield & Sons (Rural) Pty., ASBCA 24290, 85-1 BCA 17,843 (1984)(reference to inspector as "f--- idiot"); Building Maintenance Specialists, Inc., ASBCA 28022, 85-1

BCA 17,726 (1984)(profanity not to be condoned); Mudsharks Co-op, Inc., AGBCA 81-238-3, 82-2 BCA 16,117 (1982) (contracting officer's suspension of contract performance reasonable under the circumstances; contract employees had become abusive in their dialogue with the contracting officer's representative); MHC, Ltd., ASBCA 26824, 84-2 BCA 17,471 (1984)(actions of Air Force representatives were rude; not answering contractor's messages or letters uncalled for).

42. Spectrum Leasing Corp., ASBCA 25724, 26049, 85-1 BCA 17,822 (1984)(contracting officer's representative overly officious in pursuit of serial numbers where no such contract requirement).

43. Lee Maintenance Co., PSBCA 522, 79-2 BCA 14,067 (1979)(contractor's threats to do physical harm to Postal Service Personnel preempted ten day period to cure its defective performance).

44. Cascade Pac. Int'l. v. United States, 773 F.2d 287 (C.A.F.C. 1985)(Government, just as any other party, entitled to receive that for which it contracted and to accept only goods conforming to the specification).

45. Banks Constr. Co. v. United States, 176 Ct. Cl. 1302, 364 F.2d 357 (1966)(duty to cooperate and not to hinder does not extend to making the work easier); Baytron Sys. Corp., ASBCA 30411, 86-1 BCA 18,735 (1986)(Government entitled to strict performance of unambiguous specification requiring first article environmental tests for radio receivers); Multi-Roof Sys., ASBCA 26464, 84-3 BCA 17,529 (1984)(Government insistence upon strict compliance with contract requirement that roof not be left open, unsecured, and in a non waterproof condition).

46. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 3 (2d ed. 1985).

47. Boyd Int'l Ltd. v. United States, 5 FPD 66 (Cl. Ct. 1986)(contract which contractor sought to establish a prior course of dealing with was too remote); Southwest Welding & Mfg. Co., 206 Ct. Cl. 857 (1975)(contractor could not rely on observance of apparent deviation for another contractor's similar items where the reason for the deviation was unknown); Moore Elec. Co., ASBCA 33828, 87-3 BCA 20,039 (1987)(commonality of subcontractors insufficient to establish course of dealing to override unambiguous specification); Blake Constr. Co., ASBCA 30658, 85-3 BCA 18,420 (1985)(no merit to contractor's argument

that it could substitute material because other contractors did); Armada, Inc., ASBCA 27354, 27385, 84-3 BCA 17,694 (1984)(no prior contractual relationship between Government and contractor which permitted such deviation; misplaced reliance on observed practices of other contracts).

48. Tibshraeny Bros. Constr. v. United States, 6 Cl. Ct. 463 (1984)(contractor's reasonable interpretation of ambiguous terms concerning responsibility for preparing control wiring diagram); Hamilton Enters., ASBCA 21951, 78-1 BCA 13,242 (1978)(contractor's reasonable interpretation of ambiguous terms concerning provision of mess attendant services upheld); Hydromatics, Inc., ASBCA 12094, 69-2 BCA 7962 (1969)(ambiguous testing requirement and reasonable contractor interpretation thereof).

49. MHC, Ltd., ASBCA 26824, 84-2 BCA 17,471 (1984)(Government forgiveness of late deliveries under other contracts with same contractor not require same leniency in all contracts).

50. Rounds Constr. Co., PSBCA 1366, 85-3 BCA 13,343 (1985)(access to worksite provision does not include allowing site to be used as temporary housing for contractor's employees).

51. Hawaiian Dredging & Constr. Co., ASBCA 25594, 84-2 BCA 17,290 (1984)(Government not required to expedite one contractor's application for a permit over applications of other contractors).

52. ASBCA 23945, 86-3 BCA 19,089 (1986).

53. Id. at 96,473. Government duty of cooperation does not require that it assign personnel to contractor's facility. Additionally, the Government is not required to allow the contractor to procure long lead time production components or materials before first article approval so that the risk is shifted from the contractor to the Government should the first article fail. The Government is not required to "hold the bag" for the contractor. Id. First Article approval clauses are found at FAR 52.209-3 and 52.209-4.

54. AGBCA 79-163-4, 83-213-4, 86-3 BCA 19,176 (1986).

55. Failure of an inspector or agency representative, with responsibility to assure contract compliance, to object to defects in performance, does not constitute acceptance. Id. at 96,980; Fortec Constructors v. United States, 760

F.2d 1288 (C.A.F.C. 1985)(presence of Corps of Engineers Quality Assurance representative, who is charged with inspection responsibilities, does not constitute acceptance of alleged defects); Kelley Control Sys., VABCA 2337, 87-3 BCA 20,064 at 101,601-1 (1987)(VA inspections missed pointing out defects); Big Sky Contractors, Inc., AGBCA 86-330-3, 87-2 BCA 19,932 at 100,847 (1987)(Government contract personnel were not present to direct or supervise contractor personnel); Interstate Reforesters, AGBCA 84-177-3, 84-2 BCA 17,504 at 87,185 (1984)(Forest Service does not have an obligation to inspect work, "for the purpose of enabling the contractor to determine if he is in compliance with the specifications," since inspection is for the Government's benefit); Smart Products Co., ASBCA 29008, 84-2 BCA 117,426 (1984)(silence of inspector does not relieve the contractor of duty to deliver conforming items); Rosendin Elec., Inc., ASBCA 22996, 81-1 BCA 14,827 (1980)(on site Government representatives had no duty to inform contractor of defects during contract performance). The FAR clauses also follow this reasoning. Paragraph (k) of FAR 52.246-2, Inspection of Supplies Fixed Price, provides, "[i]nspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance." Likewise, FAR 52.246-12, Inspection of Construction, states at paragraph (d), "[t]he presence or absence of a Government inspector does not relieve the Contractor from any contract requirement."

56. Mercury Constr. Corp., ASBCA 23156, 80-2 BCA 14,668 at 72,340 (1980), mot. for reconsid. denied, 81-1 BCA 15,013 (1981), aff'd, 230 Ct. Cl. 914 (1982)(stated circumstances did not exist; unwitting approval by Government inspector is insufficient to shift to Government the burden of assuring that the contractor complies with the required specifications).

57. Compare Hydrospace Elecs. & Instrument Corp., ASBCA 17922, 74-2 BCA 10,682 (1974)(actual knowledge by Government of contractor's erroneous course of action, yet deliberate delay in so informing the contractor of its error, entitles contractor to resultant additional expenses) with Kelley Control Sys., VABCA 2337, 87-3 BCA 20,064 (1987)(no actual knowledge of Government inspector proven by contractor) and Noah Lewis, Contractor, VABCA 1349, 81-2 BCA 15,209, mot. for reconsid. denied, 81-2 BCA 15,322 (1981)(absent Government knowledge of nonconformity, "approval" of doors with novoply cores does not waive requirement for lumber cores).

58. Compare Maxwell Dynamometer Co. v. United States, 181 Ct. Cl. 607, 386 F.2d 855 (1967)(watching contractor perform more stringent test than contractually required binds Government to compensate for extra work) with Community Science Technology Corp., ASBCA 20244, 77-1 BCA 12,352 (1977)(Government approval of non-conforming shop drawings not binding where contractor failed to alert the Government to the deviations).

59. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972). See also Inet Power, NASA BCA 566-23, 68-1 BCA 7020 (1968)(Government exhortations to the contractor to continue performance estopped it from rejecting items as nonconforming); Joseph Morton Co., ASBCA 19793, 78-1 BCA 13,173 (1978), mot. for reconsid. denied, 80-2 BCA 14,502 (1980)(Government estopped from rescinding approval of shower stalls which clearly deviated from specifications).

60. 321 U.S. 730 (1944).

61. Id. at 733. The Court found nothing in the construction contract which obligated the Government to assist the contractor in completing performance prior to the due date. Id.

62. Kraft Const. Co., ASBCA 4976, 59-2 BCA 2347 (1959)(Government owes contractor no duty to aid foundation contractor to complete antecedent contract ahead of time agreed).

63. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 212, 452 (2d ed. 1985).

64. Metropolitan Paving Co. v. United States, 163 Ct. Cl. 420, 423, 325 F.2d 241, 244 (1963)(contemplation of early completion not required).

65. Shupe (G.M.), Inc., 5 Cl. Ct. 662 (1984)(contractor had anticipated completing construction of Nambe Falls Dam six months earlier than due date), citing to, Coley Properties Corp. v. United States, 219 Ct. Cl. 227, 234-235, 513 F.2d 380, 384 385 (1979). See also CWC, Inc., ASBCA 26432, 82-2 BCA 15,907 (1982)(contractor has right to proceed according to job capabilities at better rate of progress than own schedule; Government incurs liability if hinders or prevents early completion); Johnson & Son Erectors, ASBCA 24564, 81-1 BCA 15,082 (1981)(Government interference remediable as a constructive change).

66. 2 Cl. Ct. 116 (1983), aff'd, 731 F.2d 855 (C.A.F.C. 1984).

67. Id. at 11. The court stated, "[i]t seems that, as a matter of courtesy and cooperation, the INS should have fulfilled its promise to Milmark with respect to the test tape. However, on the basis of the preponderance of the evidence, it cannot properly be held that the INS failed to discharge a legal obligation to Milmark by failing to carry out its promise, and thereby excused Milmark from meeting the 2-week delivery schedule prescribed in the contract."

68. Ceccanti, Inc. v. United States, 6 Cl. Ct. 526 (1984)(contractor delayed by high water levels under control of nearby city; contractor had assumed liability for water level under contract's "Control of Work" clause). See also Liles Constr. Co., ASBCA 11919, 68-1 BCA 7067 at 32,668 (1968)(Government provision of places and features of work ahead of schedule and out of sequence, at contractor's insistence, was gratuitous; therefore, Government is not liable for any of the costs of overcrowding, lack of supervision, or other resultant damages).

68. Case law indicates there are five common elements to constructive acceleration:

1. Excusable delay,
2. Government knowledge of delay,
3. An acceleration order (Government statement or act),
4. Notice by contractor of the constructive change, and
5. Additional costs from the accelerated effort.

J. CIBINIC, JR. & R. NASH JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 322-3 (2d ed. 1985).

70. A.E. Gibson Co. & Amulco Asphalt Co., Joint Venture, ASBCA 13307, 70-1 BCA 8289 (1970)(reasonable pressure by the contracting officer's representative did not constitute an acceleration order).

71. Fermont Division, Dynamics Corp. of America, ASBCA 15806, 75-1 BCA 11,139 at 53,001 (1975), aff'd, 216 Ct. Cl. 448 (1978)(Government pressure to provide report of impact of fire upon production and delivery schedule not unreasonable as it did not constitute an implied threat to default the contractor).

72. ASBCA 23131, 81-2 BCA 15,168 (1981).

73. The contract authorized the Government to withhold an additional ten percent of deductions for never performed work to cover the Government's administrative expenses. A

threat to withhold this amount, which the contract clearly authorized, is not harassment. Id. at 75,069.

74. Norair Eng'g Corp. v. United States, 229 Ct. Cl. 160, 666 F.2d 546 (1981)(ten letters from the Government to the contractor were an acceleration order); Gibbs Shipyard, Inc., ASBCA 9809, 67-2 BCA 6499 at 30,159 (1967) (contracting officer demanded that the contract be performed by original completion date, "regardless of the circumstances").

75. Pathman Constr. Co., ASBCA 14285, 71-1 BCA 8905 at 41,387 (1971)(Government impressed upon contractor urgent need for barracks building prior to winter and at a meeting gave contractor reason to believe that liquidated damages would be assessed).

76. William Lagnion, ENG BCA 3778, 78-2 BCA 13,260 (1978)(contracting officer threatened appellant with default and exhorted contractor to greater efforts; contracting officer aware that contractor entitled to weather extensions but delayed in so granting). A default termination has serious consequences and may lead to a contractor's financial ruin. The Court of Claims labels default terminations a type of forfeiture. D. Joseph De Vito v. United States, 188 Ct. Cl. 979, 413 F.2d 1147 (1969). The FAR supply and services default clause is located at 52.249-8 while the construction default clause is at 52.249-10.

77. 212 Ct. Cl. 305, 546 F.2d 886 (1976).

78. The contracting officer reasonably believed that a two to three month extension would suffice for performance and since no evidence contradicts that belief his actions in threatening default termination and listing the contractor on the Contractor Experience List fell within the limits of his responsibility. Id. at 313-4. See also DeVito v. United States, 188 Ct. Cl. 979, 990, 413 F.2d 1147, 1153 (1969)("[w]here the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate"); International Tel. & Tel. Corp. v. United States, 206 Ct. Cl. 37, 509 F.2d 541 (1975)(Government must establish a specific date when it unilaterally attempts to reestablish the delivery date after it waives its right to terminate).

Duress has been commonly identified under the following three circumstances:

1. One side involuntarily accepting terms of another.

2. Absence of another alternative.
3. Coercion of the opposite party.

Louisiana Pacific Corp. v. United States. 228 Ct. Cl. 363, 365, 656 F.2d 650, 652 (Ct. Cl. 1981), citing to, Fruhauf S.W. Garment Co. v. United States, 126 Ct. Cl. 51, 111 F. Supp. 945 (1953).

79. 187 Ct. Cl. 15, 408 F.2d 382 (1969), cert. denied, 398 U.S. 958 (1970).

80. The court determined that the contractor was entitled to an equitable adjustment under the Suspension of Work clause and suspended proceedings to permit the parties to apply to the ASBCA for a quantum determination. Id., see ASBCA 9831, 71-2 BCA 8980 (1971), for the subsequent quantum determination.

81. Monarch Enters., ASBCA 31375, 86-3 BCA 19,227 (1986)(option a unilateral right of the Government to elect to extend a contract; exercise not mandatory when stated conditions of available funds, continuing need, and advantageous price met); FAR 17.201 ("[o]ption means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of contract"). Various cases have, however, placed limits upon the Government's stated unfettered discretion to make such a decision. See generally Exquisito Servs. Inc. v. United States, No. 86-3822, slip op. (5th Cir. Aug. 4, 1987)(refusal to exercise a section 8(a) contractor's option solely because the contractor declared bankruptcy is prohibited discrimination); Optimal Data Corp., NASA BCA 381-2, 85-1 BCA 17,760 (1984)(no abuse of discretion or bad faith on the part of the Government shown in its decision not to exercise a section 8(a) contractor's option); Morgan Management Sys., Inc., ASBCA 27648, 83-2 BCA 16,728 (1983)(dissatisfaction with a contractor's course and the loss of a key employee were legitimate concerns adequate to support a decision not to exercise a section 8(a) contractor's option). Commentators have argued that restrictions on the Government's unilateral right to exercise an option might apply only to the section 8(a) program. 29 G.C. 298 (Sep. 28, 1987).

82. ASBCA 28068, 28215, 86-1 BCA 18,582 (1985).

83. Id. at 93,308. The Government was not required to provide the contractor more work, nor was the contractor's ability to perform made impossible or commercially

impracticable. Additionally, the parties had agreed upon a new delivery schedule after the contractor's plant was destroyed by fire. Id.

84. Government representatives visited the plant two days after the fire and later met with the contractor, providing it free of charge, fourteen pieces of equipment. Id. at 93,306.

85. Rotair Indus., Inc., ASBCA 27571, 84-2 BCA 17,417 (1984)(cognizant officials have a duty to the Government to manage requirements reductions efficiently; internal supply regulations requiring a convenience termination when supplies are no longer needed are for the benefit of the Government, not the contractor). FAR language providing the Government convenience termination rights is both brief and broad. FAR 52.249-2 provides in part, "[t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest."

86. ASBCA 30565, 85-3 BCA 18,369 (1985).

87. Id. at 92,159. The Board reasoned that the duty to cooperate requires not hindering or interfering with a contractor's performance and that the Government is not obligated to assist in generating additional Government requirements. An argument can be made that under the facts of this case, the decision should have gone the other way. As already detailed, cooperation entails more than just a lack of hinderance, at times the Government must reasonably cooperate with the contractor. Prior to contract formation, the Government told the contractor that an advertising brochure was in the process of being coordinated and would be released in the near future. This brochure was never coordinated and, therefore, never issued. During contract performance the contractor was frequently told by Government personnel that they were unaware of the availability of its services. Id. at 92,158. This failure to take what appears to have been a reasonable action to alert Government personnel of the availability of the contractor's services appears to have been unreasonable.

88. ASBCA 28225, 86-2 BCA 18,792 (1986).

89. Genuine issues of material fact existed concerning alleged breaches of the 1979 and 1981 contracts, possible unconscionability of the Limitation of Liability clause, and the terms of the 1981 contract, therefore, no

definitive resolution of the failure to cooperate in the reduction of expenses issue was reached. Id. at 94,681.

90. Applied Devices Corp., ASBCA 23945, 86-3 BCA 19,089 at 96,473 (1986).

91. 6 Cl. Ct. 81 (1984).

92. The Claims Court found that the Government's position rested on firm ground as the contract clearly defined when responsibility for production costs passed to the Government. The triggering event, approval of the first article, had not occurred by contract termination. Accepting the contractor's argument would strip the First Article clause of the very protection it was designed to achieve. Id. The applicable first article clause provided that:

Prior to approval of the first article, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity shall be at the sole risk of the contractor, and costs incurred on account thereof shall not be allocable to this contract ... for the purpose of termination settlements, if this contract is terminated for the convenience of the Government prior to approval of the first article.

93. The court found that the contractor was not compelled to incur production related expenses before first article approval: there were no supplier dictated minimum purchase quantities nor time constraints in the delivery schedule that made production in anticipation of first article approval the preferred course of action. Id. See generally WITTE, Legal Rights & First Articles, 26 CONT. MGMT. 20 (Nov. 1986)

94. FAR 19.201(a) provides:

It is the policy of the Government to place a fair proportion of its acquisitions, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems, with small business concerns and small disadvantaged business concerns. Such concerns shall also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and

assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

The Fifth Circuit of Appeals has stated that the term, "fair proportion" applies to total awards, not awards within a particular industry. *J.H. Rutter-Rex Mfg. Co. v. United States*, 706 F.2d 702 (5th Cir.), cert. denied, 464 U.S. 1008 (1983). The Department of Defense (DOD) recently issued an interim rule effective June 1, 1987 requiring that contracting officers set aside acquisitions for exclusive competition among small disadvantaged businesses (SDB) whenever they determine that two or more such offers are anticipated and the award price does not exceed the fair market price by more than ten percent. This rule is designed to implement the statutory goal that DOD award five percent of contract dollars to SDB during fiscal years 1987, 1988, and 1989. 9 GOV'T CONT. REP. 94,415 (May 4, 1987). AFARS 19.201(b)(3) further provides that, "[h]eads of Contracting Activities shall have small and disadvantaged business utilization goal attainment included as part of their annual performance appraisals."

95. FAR 19.201(b) provides:

Heads of contracting activities are responsible for effectively implementing the Small Business and Small Disadvantaged Business Utilization Programs within their activities, including achieving program goals. They are to ensure that contracting and technical personnel maintain knowledge of small and small disadvantaged business program requirements and take all reasonable action to increase small business participation in their activities' contracting processes.

96. DFARS 19.201(a) provides, "it is the Department's policy to provide SDB concerns technical assistance, to include information about the Department's SDB program, advice about acquisition procedures, instructions on preparation of proposals, and such other assistance as is consistent with the Department's mission." The provision of production assistance has been omitted from current regulations. DAR 1-705(b)(3) previously stated that, "[t]o the extent consistent with DoD capability and resources, SBA contractors furnishing defense requirements shall be afforded production assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable."

97. ASBCA 25985, 84-2 BCA 17,467 (1984).

98. Id. at 87,022. The contractor was only guaranteed an opportunity to perform, not automatic success. DAR 1-705(b)(3), which applied to this contract, does not reflect a mandatory commitment to individual contractors. Id.

99. ABA Electromechanical Sys., NASA BCA 1081-13, 85-3 BCA 18,225 (1985). The contractor had performed several hundred Government contracts either as a prime or as a subcontractor. The Board reasoned that it strained credibility to believe that the contractor was ignorant of available assistance; it merely believed that it needed no assistance and so it asked for none. A different result can be predicted where the contractor is truly ignorant of the available resources as the applicable FAR regulations are intended to benefit small business contractors. Id. at 91,483.

100. ASBCA 17922, 74-2 BCA 10,682 (1974).

101. FAR 14.5 provides:

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. ... It is conducted in two steps:

(a) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. ...

(b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made.

See generally Chesapeake and Potomac Tel. Co., B-220512.2, 86-1 CPD 228 (1986)(protest against technical requirement in step one of two-step acquisition).

102. The Board stated that it was cognizant that the contractor is a very small business and might not have been completely aware of all the responsibilities inherent in a two-step procurement. Additionally, the Board was aware that proposed changes might have proved satisfactory. However, the Board found that the contractor was bound by the particular terms of the contract. Id. at 50,805.

103. Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966)(delay in inspection of tent pins). Additionally, where the contractor has clearly been damaged, "uncertainty as to the amount of damage does not preclude recovery." Id. at 299, citing to, Addison Miller, Inc., et al. v. United States, 108 Ct. Cl. 513, 557, 70 F. Supp. 893, cert. denied, 332 U.S. 836 (1947). However, the contract may expressly establish that certain inspections are required, thereby precluding a claim of interference. See John C. Grimberg Co., Inc., ASBCA 30654, 87-3 BCA 19,988 (1987)(contract language called for visual inspection of welding in progress, rather than randomly inspecting as was industry practice).

104. A.B.G. Instrument & Eng'g, Inc. v. United States, 219 Ct. Cl. 381, 593 F.2d 394 (1979)(Government right to reject goods before acceptance implies right to reinspect); Forsberg & Gregory, Inc., ASBCA 17598, 75-1 BCA 11,176 (1975)(framing can be inspected sequentially rather than at one time as favored by industry). FAR 52.246-2(c), Inspection of Supplies--Fixed-Price, provides:

The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the contractor unless specifically set forth elsewhere in this contract.

FAR 46.503 also provides that supplies accepted prior to arrival at destination shall not be reinspected upon arrival, but, "should be examined ... for quantity, damage in transit, and possible substitution or fraud.

105. ASBCA 24787, 84-3 BCA 17,590 (1984).

106. Id. at 87.643. Both pipe lines initially failed to meet the specification relaxed limit of 150 psi; one of the lines never could pass retesting. The applicable "Inspection and Acceptance" clause provided that if reinspected work was found to meet contractual requirements the contract price would be equitably adjusted to compensate the contractor for the additional services involved and for any delay in completion of work. Id. at 87,636.

107. R.W. Contracting, Inc., ASBCA 24627, 84-2 BCA 17,302 at 86,208 (1984)(during contract performance a change in safety regulations resulted in inspection of the contractor's vehicles weekly instead of every three months; Government conceded that additional inspections were a change to the contract).

108. WRB Corp. v. United States, 183 Ct. Cl. 409 at 509 (1968); W.F. Kilbride Constr., Inc., ASBCA 19484, 76-1 BCA 11,726 at 55,884 (1976)(fourth "final" inspection unreasonable in imposing more stringent standards than previous inspectors had employed).

109. G.W. Galloway Co., ASBCA 16656, 73-2 BCA 10,270 at 48,489 (1973), mot. for reconsid. denied, 74-1 BCA 10,521 (1974)(disruptive inspection activities included close surveillance of work operations variously characterized as "bird watching" and "hawkeyeing").

110. Lumen, Inc., ASBCA 8364, 1964 BCA 4436 at 21,371-2, mot. for reconsid. denied, 65-1 BCA 4518 (1964)(additional work imposed upon the contractor by an excessive number of inspectors resulted in an extension of 75 days to the production period of the contract).

111. North American Maintenance Co., ASBCA 21986, 78-2 BCA 13,316 at 65,133 (1978)(use of 40 inspectors, with little training, in janitorial services contract, led to great variation in standards of acceptance and made inspection system unreasonable); Kilbride Constr., Inc., ASBCA 19484, 76-1 BCA 11,726 at 55,884 (1976)(inexperience of assistant officer in charge of construction contributed to the problem).

112. Varo, Inc., ASBCA 25446, 86-1 BCA 18,531 at 93,089-90 (1985)(Navy's denial of equitable adjustment was in error as it had subsequently learned that its test results were incorrect because of faulty test equipment).

113. Rohr-Plessey Corp., PSBCA 36, 76-2 BCA 11,995 at 57,543 (1976)(using improper test samples, 40 to 50 percent of which was poor quality oversized mail, invalidated testing of mail handling machine). See also LaFollette Coal, Inc., EBCA 336-5-85, 87-3 BCA 20,099 (1987)("unrandom" sampling inadequate; default termination overturned based on Government's failure to prove noncompliance).

114. N. Fiorito Co. v. United States, 189 Ct. Cl. 215, 416 F.2d 1284 (1969)(improperly conducted compaction test which results in additional work by the contractor entitles it to equitable adjustment for the constructive change).

115. Mary Lou Fashions, Inc., ASBCA 29318, 86-3 BCA 19,161 at 96,846 (1986)(Government improperly totaled number of defects for the various samples rather than using the number of defects within each sample as the accept/reject standard); (H & H Enters., Inc., ASBCA 26864 et al., 86-2 BCA 18,794 (1986)(not enough defects existed in an initial sample to warrant rejection of the lot as the Board found that several defects listed by the Government were not valid). Government miscalculations may also occur during contract formation, such as in estimating the amount of work to be accomplished. See Singleton Contracting Corp., IBCA 1838, 87-3 BCA 19,967 at 101,091 (1987)(delays resulted from Government's miscalculation of square footage of work).

116. Murdock Constr. Co., IBCA 1050-12-74, 77-2 BCA 12,728 (1977)(project supervisor directed specific performance; contractor complained but told no replacement available).

117. Compare G.A. Karnavas Painting Co., NASA BCA 28, 1963 BCA 3633 (1963)(direction as to how painting utensils should be cleaned, paint strained, drop cloths shaken) with Joseph H. Roberts v. United States, 174 Ct. Cl. 940, 357 F.2d 938 (1966)(overzealous conduct resulting in complete control and dominion by the inspector).

118. ENG BCA 4650, 85-3 BCA 18,214 (1985).

119. Id. at 91,428. The contract was silent concerning the proportion of unacceptable "schist" rock permitted for slope protection. That a limit of ten percent would permit construction without structural problems was unrebutted. Tests showed the stockpiles to contain five percent schist. Id. See also Al Johnson Constr. Co., ENG BCA 4170, 87-2 BCA 19,952 at 101,002 (1987)(adoption of more stringent inspection procedure not justified where contract failed to indicate use of more stringent test); Xplo Corporation, DOT CAB 1246, 86-2 BCA 18,871 (1986)(direction to use a five-by-five foot grid rather than a 100-foot by 25-foot grid was a more stringent survey than normally employed); J.J. Barnes Constr. Co., ASBCA 27876, 85-3 BCA 18,503 at 92,935 (1985)(use of straightedge to check evenness of walls overly strict); AGH Indus., Inc., ASBCA 25848, 26535, 85-1 BCA 17,784 at 88,849 (1984)(Government direction to tighten the tolerances of the inspection gauge was a constructive change to the contract; contractor entitled to compensation).

120. A.B.G. Instrument & Eng'g, Inc. v. United States, 219 Ct. Cl. 381, 593 F.2d 394 (1979)(Government imposition of a 100 percent inspection requirement justified as it

followed rejection of lots 10 and 11); Fairchild Hiller Corp., ASBCA 11640, 68-1 BCA 6849 (1968)(Government's temporary imposing stricter inspection system proper where contractor's quality of work was defective).

121. ASBCA 26864 et al., 86-2 BCA 18,794 (1986).

122. Id. at 94,712. The Board found that the contractor's decision not to proceed with production after the wrongful rejection of the first box of lot number one was a reasonable decision to mitigate damages; had box number two been improperly rejected, the Government's liability would have been correspondingly greater. Therefore, the Board held that the Government's wrongful rejection excused the contractor's failure to proceed. Id.

123. Riverport Indus., Inc., ASBCA 28089 et al., 86-2 BCA 18,835 at 94,919 (1986)(Government failure to establish an inspection standard, which was a condition precedent for presentation of the rocket motors, excused contractor's failure to deliver).

124. WRB Corp. et al. dba Robertson Constr. Co. v. United States, 183 Ct. Cl. 409, 491 (1968)(zero tolerance standard a constructive change to the contract; contractor entitled to additional compensation).

125. Warren A. Johnson, AGBCA 82-292-3, 83-175-3, 83-2 BCA 16,562 at 82,372 (1983)(burden on contractor to prove inspections were excessive; Government within rights to strictly enforce agreement).

126. AGBCA 82-116-1, 85-3 BCA 18,269 (1985).

127. Id. at 91,710. Contractor testified that 90 percent of seedlings which lacked "firmness" based upon three finger test would have passed needle pull test. However, even if all reductions for lack of firmness had been eliminated the contractor still would not have achieved an 80 percent acceptable planting percentage. Id.

128. C.E. Wylie Constr. Co., ASBCA 31823, 86-3 BCA 19,033 at 96,135 (1986)(all delay chargeable to contractor where Government correctly rejected roof deck under barracks construction contract); Hilltop Gun & Saw Shop, AGBCA 81-183-1, 85-2 BCA 18,107 at 90,896 (1985)(contractor failed to establish that inspector went beyond contract requirements, therefore, second inspection not justify abandonment of work).

129. AGBCA 86-166-3, 86-2 BCA 19,004 (1986).

130. Id. at 95,954. See also Ben Henderson Logging, AGBCA 84-127-1, 86-3 BCA 19,064 at 96,279 (1986)(board recognizes element of judgment by inspectors who determine planting quality in tree planting contracts; exercise may vary between inspectors or by particular inspector without exceeding contract limitations)

131. Alliance Properties, Inc., ASBCA 25610, 84-1 BCA 17,101 at 85,125 (1983)(contractor failed to take minimal step of pointing out specific instances of alleged improper rejection; Government burden of proving that work it rejected not conform to contract requirements, therefore, irrelevant).

132. G.A. Karnavas Painting Co., NASA BCA 28, 1963 BCA 3633 at 18,265 (inspector admitted that he had supervised the job). The contractor will also prevail where it is obvious that the Government failed to follow appropriate inspection procedures. Poe Asphalt Paving, Inc., AGBCA 85-207-1, 86-2 BCA 18,809 at 94,780 (1986)(Government must return money withheld as price reduction for improper performance where Government failed to follow proper inspection procedures; Government derived benefit of reduced price without meeting burden of establishing entitlement in accordance with its own specifications).

133. Ultra Constr. Co., VABCA 1759, 85-2 BCA 18,009 at 90,305 (1985)(no interference from patient in room where there was no complaint during performance, most of the work had to be done elsewhere, and the work proceeded on schedule); Lyburn Constr. Co., ASBCA 29581, 85-1 BCA 17,764 at 88,736 (1984)(no complaints of over-inspection ever filed during contract performance). See also Yankce Telecommunications Laboratories, Inc., ASBCA 25240 et al., 85-1 BCA 17,786 at 88,875 (1984)("[w]e deem it highly significant ... [contractor] neither sought clarification or explanations thereof").

134. Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966)(that rejection factor dropped from 50 percent to 10 percent with a new inspector not, per se, proof of overzealous first inspector); Maintenance Eng'rs., ASBCA 23131, 81-2 BCA 15,168 at 75,069-70 (1981)(evidence not support claim of bias merely because inspection pass rate improved with second inspector).

135. 175 Ct. Cl. 288.

136. Joseph Morton Co., Inc. v. United States, 757 F.2d 1273 (C.A.F.C. 1985)(nine hundred and fifty alterations is not a small number, but it is not mind boggling; on a large

sophisticated contract one must expect such changes). See also General Dynamics Corp. v. United States, 218 Ct. Cl. 40, 585 F.2d 457 (1978)(contractor should have anticipated major series of changes in a nuclear submarine contract).

137. Id. at 1278, citing to, Hearings on S. 2292, S. 2787, S. 3178 Before the Subcomms. on Federal Spending Practices and Open Government, Governmental Affairs, Citizens and Shareholders Rights and Remedies and The Judiciary, 95th Cong., 2d Sess. 39-40 (1978).

138. Wunderlich Contracting Co. v. United States, 240 F.2d 201 (10th Cir. 1957)(6000 plus changes during construction of Veterans Administration hospital).

139. S. Patti Constr. Co., ASBCA 8423, 1964 BCA 4225 at 20,502 (1964)(that more than 2000 changes may have been ordered not a breach of the Government's duty to cooperate, however, it supports the contractor's contentions that the specifications were faulty). Recovery has been allowed for significant disruption even when only one change order has been issued. Sante Fe, Inc., VABCA 2168, 87-3 BCA 20,104 (1987)(Field Proceed Order unreasonably interrupted and suspended progress of work as direction was ill-concieved).

140. 187 Ct. Cl. 269, 408 F.2d 1030 (1969).

141. Whether the 1000 changes resulted in the addition of significant development work and, hence, a cardinal change to the contract also was at issue. Id.

142. Compare Peter Kiewit Sons Co. v. Summit Constr. Co., 422 F.2d 242 (8th Cir. 1969)(change requiring subcontractor to place backfill with other subcontractors' work disruptive and beyond scope of contract where adds over 200 percent to cost of backfill) with Axel Elecs., Inc., ASBCA 18990, 74-1 BCA 10,471 (1974)(performance characteristics required by the Government, which resulted in a claimed adjustment of 170 percent, not a cardinal change). A cardinal change has been defined as one which fundamentally alters the contractual relationship extinguishing the duty of the contractor to continue with performance. Kakos Nursery, Inc., ASBCA 10989, 66-2 BCA 5733, mot. for reconsid. denied, 66-2 BCA 5909 (1966).

143. ASBCA 26544 et al., 85-1 BCA 17,783 (1984).

144. Id. at 88,835. Although the contractor's president asserted that the sheer number of Government visitors interfered with its operations, the program manager

conceded that the visits sometimes assisted its performance. Id.

145. G.W. Galloway Co., ASBCA 16656, 73-2 BCA 10,270 at 48,500 (1973), mot. for reconsid. denied, 74-1 BCA 10,521 (1974)(substantial disruptive effect assumed even though most of the visits were for official business or normal inspection purposes).

146. GSBCA 7511, 86-3 BCA 19,201 (1986).

147. Id. at 97,118. But for the Government delay, the contractor would not have experienced the rain delays of Wednesday afternoon, Thursday, and Friday. Where the Government is responsible for delays that push a contractor into a period of adverse weather, it is also responsible for the delays caused by such weather. L.O. Erayton & Co., IBCA 641-5 67, 70-2 BCA 8510 at 39,560 (1970).

148. Giuliani Contracting Co., Inc., ASBCA 32615, 87-1 BCA 19,339 at 97,850 (1986)(although understandable that the academy did not want trenching to interfere with the season opener football game, all delay was unreasonable under the suspension of work clause).

149. Ames & Denning, Inc., ASBCA 6956, 1962 BCA 3406 at 17,483 (1962)(contractor experienced a constructive suspension of work because of Government's excessive movement of aircraft in and out of hangars).

150. ASBCA 30305, 85-2 BCA 18,156 (1985).

151. Id. at 91,147. The Board allowed the contractor to recover its extra expenses because the Government's lack of diligence resulted in an unreasonable delay for the contractor. Id. See also Noslo Eng'g Corp., ASBCA 27120, 86-3 BCA 19,168 at 96,901 (1986)(Government use of work site during contractor's scheduled work performance was not compensable as the contract stated that contractor would be required to leave the site from time to time to permit Government tests with gymnasticator).

152. See Clatertos, Inc., IBCA 1726-9-83, 86-3 BCA 19,183 at 97,036 (1986)(Government error in placing benchmarks prior to contractor's excavation); Cinusa Contractors, Inc., ENG BCA 4637, 85-3 BCA 18,258 at 91,672 (1985)(directions to excavate in a particular manner was a constructive change); Granite Groves (A Joint Venture), ENG BCA 4045, 85-1 BCA 17,738 at 88,570 (1984)(direct contractor on method of excavating tunnel).

153. Circle Elec. Contractors, Inc., DOTCAB 76-27, 77-1 BCA 12,339 at 59,667 (1977)(Government hindered contractor by directing use of vibrator during concrete pour work as it was not contractually required); Noslo Eng'g Corp., ASBCA 27120, 86-3 BCA 19,168 at 96,900 (1986)(Government direction to conform to non-contractual safety standards is a change order allowing the contractor an equitable adjustment). The Government commonly imposes additional requirements upon contractors. See JBS Missouri, Inc., ASBCA 34044, 87-2 BCA 19,904 at 100,693 (1987)(contractor entitled to equitable adjustment for extra equipment and increased cleaning); Scientific Coating Co., VABCA 2377, 87-2 BCA 19,885 at 100,599 (1987)(cleaning beyond contract requirements compensable); Orbas & Assocs., ASBCA 33358, 87-2 BCA 19,858 at 100,468 (1987)(requiring extra submittal of schedule of prices entitled contractor to additional compensation).

154. ASBCA 27795, 85-2 BCA 18,150 (1985).

155. Id. at 91,116. The contractor was delayed from the Government's instruction to remove all columns until it was told to proceed with core sampling, a period of three days. Additionally, the Board found that the contractor could not rely on the few previous occasions when core samples were not required despite similar noncompliance with specifications. Id.

156. Compare Don Cherry, Inc., ASBCA 27795, 85-2 BCA 18,150 at 91,116 (1985)(Government gave inconsistent signals to contractor by reversing its direction through a series of three letters) with Western Contracting Corp., IBCA 1961, 86-2 BCA 18,801 at 94,738 (1986)(contractor failed to establish that it was issued any written or oral directive to disregard the specified design grade). See generally Hiestand, Burden Of Proof: Who's On First Base?, 21 PUB. CONT. NEWSL. 3 (Winter 1986).

157. IBCA 1873, 85-2 BCA 18,070 (1985).

158. See Corbetta Constr. Inc. v. United States, 198 Ct. Cl. 712, 723 (1972) where the Court of Claims stated, "[a] government contractor cannot properly be required to exercise clairvoyance in determining its contractual responsibilities. The crucial question is 'what plaintiff would have understood as a reasonable construction contractor,' not what the drafter of the contract terms subjectively intended." (Footnote and citations omitted.) A special clause could have given the Government either the right to delay the burning or granted an adjustment for delay encountered. 27 Gov't Contractor 157 (May 27, 1985).

159. Id. at 90,717. The Government failed to show any right to defer burning of slash under the present contract until it could be burned with slash from a later contract for which the contractor was not responsible. Where two contracts are held by the same contractor, Government interference with one contract may impact the other. Compare Hewitt Contracting Co., ENG BCA 3790 et al., 79-2 BCA 14016 (1979)(Government's failure to grant adequate time extension under one contract impacted progress under the other) with Great West. Util. Corp., ENG BCA 4933 85-2 BCA 18,021 (1985)(contractor unable to prove impact on second contract).

160. Carpenter Constr. Co., NASA BCA 18, 1964 BCA 4452 (1964)(Government gave direct order to continue pouring concrete). Conversely, direction to stop work rather than allowing continued performance may be compensable. McDaniel Enters., GSBCA 8107, 87-2 BCA 19,729 at 99,885 (Government refusal to let work continue was unreasonable).

161. Green Planting Co., AGBCA 85-195-3, 85-288.3, 86-2 BCA 18,808 at 94,777 (1986)(Forest Service failed to prove that it had an agreement with the contractor whereby it could order where the contractor would start work).

162. Fuerland-Werkstatte GmbH, ASBCA 32970, 87-3 BCA 20,012 (1987)(Government not direct performance during winter weather excusable delay); Elder James W. Thompson, HUD BCA 81-592-C23, 81-593-C24, 86-3 BCA 19,072 at 96,358 (1986)(no credible evidence that the Government had incited a contractor's former employee to sabotage its performance).

163. EZ Constr. Co., ASBCA 31508, 87-2 BCA 19,873 at 100,500 (1987)(no contract change where contractor already required to adjust factory set anticipator shutoff settings); Brooks E. Cook, PSBCA 1350, 86-3 BCA 19,073 at 96,362 (1986)(highway mail transportation contractor failed to prove that overloading affected its performance); Neal and Co., DOT CAB 1393, 85-1 BCA 17,794 at 88,948-9 (1984)(contracting officer's direction that Phase II buildings be released for painting on a one-for-one basis as Phase II buildings were completed did not prolong contract performance).

164. CEBCO Constr., Inc., VABCA 2206, 85-3 BCA 18,443 at 92,665 (1985)(Government direction not constructive change where it was the contractor's failure to comply with those directions which resulted in the defective work); Conrad Brother, Inc., PSBCA 1188, 84-3 BCA 17,580 at 87,583 (1984)(contractor not entitled to equitable adjustment where it disobeyed the Government's direct order).

165. AGBCA 84-342-1, 85-3 BCA 18,331 (1985).
166. Id. at 91,940. The contractor was unable to persuade the Board that its interpretation should be followed. Id.
167. NASA BCA 381-2, 85-1 BCA 17,760 (1984).
168. Id. at 88,715. The contract required 24 computer operators. As two of these positions were vacant, the hiring of an additional operator did not result in incurrence of costs beyond the terms of the contract. Id.
169. ASBCA 28676, 86-1 BCA 18,609 (1985).
170. Id. at 93,406. The contractor failed to establish what its expenses would have been to accomplish an acceptable critique without the environmental consultant. Id.
171. J. Lawson Jones Constr. Co., ENG BCA 4363, 86-1 BCA 18,719 at 94,169 (1986)(unpersuasive Government argument that subcontractor performing incompetent soils quality control work).
172. Wolfe Constr. Co., ENG BCA 3607 et al., 84-3 BCA 17,701 at 88,330 (1984)(grave responsibility to cause a summary dismissal from employment; justification on spurious grounds constitutes interference). Directions to discharge an employee may also be a factor in contract award controversies. See Republic Maintenance of Ky., Inc., B-226991, 87-1 CPD 564 (1987)(not reasonable for contractor to assume continuing prohibition on hiring of discharged employee for subsequent procurements).
173. ASBCA 29646, 86-2 BCA 18,754 (1986).
174. Id. at 94,440. The contract provided for either replacement of the units free of charge to the Government or termination of the contractor's right to proceed under the Termination for Default clause. In its redesign the Government substantially upgraded the air handling system. Where the Government was only entitled to a Chevrolet it had no right to procure a Cadillac at the contractor's expense. Id.
175. Louisiana-Pacific Corp. v. United States, 228 Ct. Cl. 363, 656 F.2d 650 (1981)(claim of illegal partial cancellation of timber sale contract).
176. See G. L. Christian and Assoc. v. United States, 312 F.2d 418 (Ct. Cl.), rehearing denied, 320 F.2d 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1964).

177. Valley Support Servs., ASBCA 29162, 84-3 BCA 17,523 at 87,249 (1984)(placing displays in commissary aisles made cleaning work more difficult and costly entitling the contractor to an equitable adjustment of \$115.84).

178. Nichols Dynamics, Inc., ASBCA 17949, 75-2 BCA 11,556 at 55,169 (1975)(unmuffled noise of engine run-ups on power check facility caused reduction in labor efficiency).

179. John M. Bragg, ASBCA 9515, 65-2 BCA 5050 at 23,777 (1965)(contractor may recover for extra work under Changes clause from flooding caused by Government construction of ditches designed to protect power line poles but which aggravated effects of weather); Volentine & Littleton Contractors v. United States, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959)(Government actively interfered with contractor by flooding its work site to avoid delay of a dominant contractor's more expensive work); A. Geris, Inc., ENG BCA 2869, 68-2 BCA 7320 at 34,046 (1968)(culvert did not function as contractor reasonably expected it would from Government furnished information).

180. ENG BCA 3734, 86-2 BCA 18,748 (1986).

181. Id. at 94,418-9. The contractor failed to place protective measures on the sand/earthfill within a short time after placement. Additionally, the contractor's personnel situation was constantly in flux and rental equipment was frequently removed from the site by the vendors, presumably for nonpayment. Id.

182. Hawaiian Dredging & Constr. Co., ASBCA 25594, 84-2 BCA 17,290 (1984)(Government not liable for damages from third party actions absent its fault, negligence, or unqualified warranty).

183. DOT CAB 1242, 86-2 BCA 18,867 (1986).

184. Id. at 95,146. The Board reasoned that the Coast Guard did not hinder the contractor's blasting operations by refusing to deal directly with city officials as it was not necessary to obtain their approval to demolish the bridge. Neither did the Coast Guard's refusal to enter into a hostile confrontation with the city constitute a breach of the duty to cooperate either. Id.

185. Dravo Corp., ENG BCA 3800, 79-1 BCA 13,575 at 66,516 (1979). One area so designated was public space and required a municipal permit, which the municipality subsequently refused to grant. Id.

186. IBCA 1889, 86-3 BCA 19,180 (1986).

187. Id. at 96,996. The contract specifications named the refuge manager as the person with whom work was to be scheduled and the contracting officer re-affirmed her delegation of authority by a written letter. The Government had previously granted 21 days for the extra work. Id.

188. Amos & Andrews Plumbing, Inc., ASBCA 29142, 86-2 BCA 18,960 at 95,737 (1986)(contractor may recover costs in performing work subsequent to initial installation of thermocouple necessitated by Government designated expert's erroneous advice). See Franklin E. Penny Co. v. United States, 524 F.2d 668, 676 (Ct. Cl. 1975)(costs attributable to technical problems arising from Government designated expert's determination, "within the Government's sphere of responsibility").

189. DOT CAB 1244, 86-2 BCA 18,869 (1986).

190. Id. at 95,160-1. Knowledge of the technical representative is often imputed to the contracting officer. See U.S. Fed. Eng'g & Mfg., ASBCA 19909, 75-2 BCA 11,578 at 55,298-9 (1975)(technical representatives are contracting officer's eyes and ears, their knowledge is his knowledge).

191. Shipco Gen., Inc., ASBCA 29206, 29942, 86-2 BCA 18,973 at 95,825 (1986)(Government failed to overcome contractor's prima facie case that its stucco application method was the one required by contract).

192. ASBCA 31292, 86-2 BCA 18,779 (1986).

193. Id. at 94,625. Recovery was allowed despite the contractor's inability to establish the specific number of additional hours the office was open as the Board found it clear from the record that offices were open longer than anticipated. Id.

194. Rivera Gen. Contracting, GSBCA 5797, 81-2 BCA 15,288 (1981)(liability premised on fact that GSA, not tenant agency, responsible for contract compliance).

195. Deming v. United States, 1 Ct. Cl. 190, 191 (1865).

196. Jones v. United States, 1 Ct. Cl. 383, 385 (1865).

197. 7 Cl. Ct. 16 (1984).

198. Id. The court also recognized that the sovereign act doctrine could be invoked in the absence of a national

emergency and that the preservation of federal lands in their wilderness state for future public use was in the national interest. Whether the Government act is directed at only the contractor or whether it affects the public in general, is often the focal point of judicial scrutiny. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 258 (2d ed. 1985).

199. Amino Bros. v. United States, 178 Ct. Cl. 515, 372 F.2d 485, cert. denied, 389 U.S. 846 (1967)(release of water affected the public generally and was not directed solely towards the contractor).

200. American Int'l Constructors, Inc., ENG BCA 3633, 3667, 77-2 BCA 12,606 at 61,108-9 (1977)(record indicates directive was uniformly applied).

201. Volentine & Littleton Contractors v. United States, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959)(Government actively interfered with contractor by flooding its work site to avoid delay of a dominant contractor's more expensive work).

202. John M. Bragg, ASBCA 9515, 65-2 BCA 5050 at 23,777 (1965)(contractor may recover for extra work under Changes clause from flooding caused by Government construction of ditches designed to protect power line poles but which aggravated effects of weather).

203. E.C. Ottinger v. United States, 116 Ct. Cl. 282, 88 F. Supp. 881 (1950)(assumption of control over manpower obligates Government treat contractor equitably; sovereign acts doctrine not invokable where Government breaches contract).

204. Gerhardt F. Meyne Co. v. United States, 110 Ct. Cl. 527, 550, 76 F.Supp 811 (1948)(extra expenses where promised road not available).

205. 5 Cl. Ct. 539 (1984).

206. Id. at 550.

207. Id. The Government had asserted that the contractor caused the delays or that any delays caused by the Government were so intertwined with those caused by the contractor that separation was not possible. Specifically, the Government contended that the contractor contributed to the delay in furnishing design plans by failing to submit an engineering schedule and resurrecting a long-span skylining idea. Id.

208. Systems Concepts, Inc., ASBCA 29096, 87-1 BCA 19,388 at 98,022 (1986)(contractor failed to prove any impact upon performance). See also Consumers Oil Co., ASBCA 24172, 86-1 BCA 18,647 (1985)(recovery for breach dependent upon material, versus insubstantial, breach).

209. Space Age Eng'g, Inc., ASBCA 25761 et al., 86-1 BCA 18,611 at 93,463 (1985)(contractor unable to show any substantial impact upon operations from phasing-out of Government control and phasing-in of contractor control).

210. Lewis Management & Ser. Co., ASBCA 24802 et al., 85-3 BCA 18,416 at 92,471 (1985)(isolated instances of Government interference with contractor's performance no defense to default termination).

211. Maintenance Eng'rs, ASBCA 23131, 81-2 BCA 15,168 at 75,069 (1981)(inspector's outburst not to be condoned, but it must be viewed in context as an isolated instance of a lack of control which does not equate to harassment).

212. ASBCA 18855, 76-1 BCA 11,729 (1975).

213. Id. at 55,920. As the contract clearly apprised the contractor of the occupied status of the quarters, it was unreasonable for it to assume that it would proceed in an assembly-line fashion without at least a few isolated instances of unreasonable actions by quarters occupants. Also, extensive harassment was not shown by the record. Id.

214. DOT CAB 74-32B, 75-2 BCA 11,524 (1975).

215. Id. at 54,994. Absent an overwhelming and compelling reason for placing an observer on site, the Board declined to do so. Regular discovery proceedings were felt to provide a sufficient alternative. Id. Provision for reprourement costs is found at paragraph (b) of FAR 52.249-8, DEFAULT (FIXED PRICE SUPPLY AND SERVICE)(APR 1984):

If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION)(APR 1984) provides in paragraph (a) that when the contractor has failed to complete the work, "the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work."

216. The Contract Disputes Act of 1978 greatly strengthened the discovery process with the addition of Section 11, Subpoena, Discovery, and Deposition. 41 U.S.C. 610 (1982).

217. ASBCA 12545, 69-1 BCA 7566 (1969).

218. Id. at 35,049. The Board discussed the Government's duties in terms of affirmative obligations, to do whatever is reasonably necessary to enable the contractor to perform, and negative obligations, not to interfere with the contractor's performance. Id.

219. Sun Oil Co. v. United States, 215 Ct. Cl. 716, 745, 572 F.2d 786 (1978)(contractor failed to establish in this particular case involving three separate delays, that the Government acted unreasonably). See also Tri-Cor, Inc., 198 Ct. Cl. 187, 221, 458 F.2d 112, 131 (1972) (reasonableness of Government action to be determined by facts of each case). The Court of Claims has also defined reasonable to mean, "that which is proper, fair, equitable and honest in the judgment of a 'reasonable' man, and is suitable and appropriate to the end in view of the light of the facts and circumstances." National Steel & Shipbuilding Co. v. United States, 190 Ct. Cl. 247, 267-8, 419 F.2d 863, 876 (1969).

220. 5 Cl. Ct. 539 (1884).

221. Id. at 550, citing to Lewis-Nicholson, Inc. v. United States, 213 Ct. Cl. 192, 199, 550 F.2d 26,29 (1977)(if staking errors had been the only problem in the case their impact on contractor's operations may not have been sufficient to constitute a breach).

222. General Ry. Signal Co., ENG BCA 4250 et al., 85-2 BCA 17,959 at 89,997 (1985)(Government immediately directed other contractor to make area available and it complied).

223. L.T.D. Builders, ASBCA 28005, 28662, 85-3 BCA 18,302 at 91,848 (1985)(contractor aware before bidding that building to be occupied during performance; either knew or should have known that it was an active welding and machine shop and of possible occasions when material would block contractor's way).

224. Biehler Painting Co., 76-1 BCA 11,729 at 55,920 (1975).
225. Tolis Cain Corp., DOTCAB 72-2, 76-2 BCA 11,954 (1976)(Government had no notice of prior problem with COMNET prior to shutdown; service restored next day).
226. Zinco Gen. Contractor, Inc., GSBCA 6182, 82-2 BCA 15,917 at 78,894 (1982).
227. Raytheon Serv. Co., GSBCA 5695, 81-1 BCA 15,002 at 74,223 (1981).
228. George A. Fuller Co. v. United States, 108 Cl. Ct. 70, 69 F. Supp. 409 (1947).
229. Kehm Corp. v. United States, 119 Ct. Cl. 454, 93 F. Supp. 620 (1950)(Government delay in delivering tail assemblies).
230. Ballenger Corp., DOT CAB 74-32, 84-1 BCA 16,973 at 84,477 (1983), modified on other grounds, 84-2 BCA 17,277 (1984).
231. Cedar Lumber, Inc. v. United States, 5 Cl. Ct. 539, 550 (1984).
232. Abbett Elec. Corp. v. United States, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958).
233. M.D. Funk, ASBCA 20287, 76-2 BCA 12,120 at 58,222, mot. for reconsid. denied, 77-1 BCA 12,241 (1976).
234. G&S Constr., Inc., ASBCA 28677, 86-2 BCA 18,791 at 94,306 (1986).
235. Swinerton & Belvoir, ASBCA 24022, 81-1 BCA 15,156 at 74,989 (1981).
236. Automated Servc., Inc., GSBCA EEOC-2, 81-2 BCA 15,303 at 75,764 (1981).
237. Xplo Corp., DOT CAB 1250, 86-2 BCA 18,863 at 95,114 (1986); B&A Elec. Co., ASBCA 18649 et al., 86-1 BCA 18,525 at 93,032 (1985).
238. Bristol Elec., Inc., ASBCA 24792 et al., 84-3 BCA 17,543 at 87,428 (1984).
239. L.T.D. Builders, ASBCA 28005, 28662, 85-3 BCA 18,302 at 91,849 (1985); Able Contracting Co., ASBCA 27411, 85-2 BCA 18,017 at 90,381 (1985).

240. Cinusa Contractors, Inc., ENG BCA 4637, 85-3 BCA 18,258 at 91,674 (1985).

241. R.W. Contracting, Inc., ASBCA 24627, 84-2 BCA 17,302 at 86,224 (1984).

242. W.S. Darley and Co., GSBCA 7557, 85-3 BCA 18,512 at 92,984 (1985); Premier Gear & Mach. Works, Inc., ASBCA 9978, 65-2 BCA 5182 at 24,368 (1965).

243. C.R.F., ASBCA 18748, 76-2 BCA 12,129 at 58,290 (1976).

244. Innovations Hawaii, ASBCA 30619, 87-1 BCA 19,376 at 97,968 (1986).

245. 7 Cl. Ct. 379 (1985).

246. Id. The contractor failed to produce even a "scintilla" of evidence that contract provisions required the return of the samples by a specific time limit or that the contractor was thereby precluded from complying with the specifications. Id.

247. Space Age Eng'g, Inc., ASBCA 25761 et al., 86-1 BCA 18,611 at 93,463 (1985)(no evidence of Government uncooperativeness towards the contractor during turnover of facility from Government to contractor control); Sun Oil Co. v. United States, 215 Ct. Cl. 716, 756, 572 F.2d 786 (1978)(Government efforts in attempting to resolve a dispute were not so unreasonable as to be arbitrary).

248. ASBCA 23945, 86-3 BCA 19,089 (1986).

249. Id. at 96,472. The Judge went on to state that receipt by the contractor of both a price increase and time extension on the one claim filed does not indicate Government hostility. Id.

250. AGBCA 85-308-3, 86-3 BCA 19,135 (1986).

251. Id. at 96,725. Prejudice to the other party could result from delayed assertion of rights as otherwise avoidable costs could be incurred. Foster Wheeler Corp. v. United States, 206 Ct. Cl. 533, 513 F.2d 588 (1975)(delay in asserting impossibility of performance for design of shock-hard boilers); Ling-Tempco Vought, Inc. v. United States, 201 Ct. Cl. 135, 475 F.2d 630 (1973)(contractor not entitled to reimbursement as continued performance in reliance on contracting officer's misstatements not reasonable after Navy's other plan made public).

252. Arvid E. Benson, ASBCA 11116, 67-2 BCA 6659 at 30,879 (1967)(reasonable for Government not to default terminate the contractor late in the performance period as only greater delay would have resulted).

253. Ben C. Gerwick, Inc. v. United States, 152 Ct. Cl. 69, 285 F.2d 432 (1961)(Government failed to furnish steel sheet piles for quay wall when reasonably needed).

254. General Ry. Signal Co., ENG BCA 4250 et al., 85-2 BCA 17,959 at 89,996 (1985).

255. Asheville Contracting Co., DOTCAB 74-6, 76-2 BCA 12,027 at 57,711 (1976), mot. for reconsid. denied, 78-1 BCA 12,971 (1978).

256. J.W. Bateson Co., GSBCA 3441, 73-2 BCA 10,098 at 47,432 (1973).

257. Development Management Consultants, Inc., HUDBCA 79-405-C28, 85-3 BCA 18,338 at 91,969 (1985).

258. Star Communications, Inc., ASBCA 8049, 1962 BCA 3538 at 17,971 (1962).

259. ASBCA 11116, 67-2 BCA 6659 (1967).

260. Id. at 30,879. The Board also specifically noted that the contractor was not caused unreasonable delay. Id.

261. Imperial Van & Storage Co., ASBCA 11462, 67-2 BCA 6621 at 30,705 (1967)(notice of termination not required where contractor repudiated its performance obligations under contract as notification would be a "vain and futile act"). Neither is the contractor required to perform senseless acts. Angler's Co. v. United States, 220 Ct. Cl. 727 (1979)(contractor not required to perform useless act of attempting to use the Government's priority system where it could not have obtained needed materials).

262. J.W. Bateson Co., GSBCA 3441, 73-2 BCA 10,098 at 47,433-4 (1973)(unreasonable Government delay in relocating electric power lines compensable under Suspension of Work clause of contract as continued presence delayed contractor's planned excavation).

263. See Bruno Law v. United States, 195 Ct. Cl. 370, 419 (1971)(Government inability to coordinate work among contractors and resultant liability); Stephenson Assocs., Inc., GSBCA 6573, 6815, 86-3 BCA 19,071 at 96,327 (1986)(Government liable for failure to coordinate work of its prime contractors);

State Mechanical Corp., VABCA 2074, 85-1 BCA 17,907 at 89,663 (1984)(Government failed to coordinate other contractor's installation of plaster ceiling; contractor entitled to compensation for extra work); Yarno & Assocs., ASBCA 10257, 67-1 BCA 6312 at 29,206 (1967)(Government failed to control activity of other on-site contractor).

264. AGBCA 82-227-1, 84-3 BCA 17,684 (1984).

265. Id. at 88,192. The contractor minimized the delay by conducting drilling operations during two weeks of the delay. However, its blasting had to be delayed until winter weather caused inefficiency in this portion of its work. Id.

266. General Ry. Signal Co., ENG BCA 4250 et al., 85-2 BCA 17,959 at 89,997 (1985)(Government did nothing when other contractor refused to comply with contractual obligation; respondent was obligated to affirmatively resolve dispute precipitated by third party's blocking of operations).

267. ENG BCA 3633, 77-2 BCA 12,606 (1977).

268. Id. at 61,108. The Board found that the Government attempted to keep the other contractor operating at almost any cost and displayed a complete lack of concern for its treatment of the appellant contractor. Id.

269. L.L. Hall Constr. Co. v. United States, 177 Ct. Cl. 870, 878, 379 F.2d 559 (1966)(the two other contractors were substantially behind schedule, proceeding slowly, and the Government considered them to be more critical to operations).

270. Volentine & Littleton Contractors v. United States, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959)(flooding its work site with less than 24 hours notice caused great difficulty for the contractor).

271. James L. Patten, IBCA 1873, 85-2 BCA 18,070 at 90,717 (1985).

272. Compare A.S. Schulman Elec. Co. v. United States, 145 Ct. Cl. 399 (1959)(under breach of contract theory contractor entitled to recover delay costs where notice to proceed issued with notice to suspend work under the contract) and Abbett Elec. Corp. v. United States, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958)(under breach of contract theory letter purporting to be notice to proceed but which attempted to circumvent requirement that notice be issued within a specific time entitled contractor to delay costs) with ABC Demolition Corp., GSBCA 2289, 68-2 BCA 7166

(1968)(compensable delay under Suspension of Work clause where notice to proceed not issued when acceptable bonds submitted).

273. Compare Ross Eng'g Co. v. United States, 92 Ct. Cl. 253 (1940)(under breach of contract theory all delay beyond 12 days unreasonable) and Edward A. Stafford v. United States, 109 Ct. Cl. 479, 74 F. Supp. 155 (1947)(under breach of contract theory 11 month delay reasonable) with Kraft Constr. Co., ASBCA 4976, 59-2 BCA 2347 (1959)(under Suspension of Work clause Government has an implied duty to give notice to proceed in a reasonable time) and L.O. Brayton & Co., IBCA 641-5-67, 70-2 BCA 8510 (1970)(under Suspension of Work clause Government could have been more diligent).

274. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 434 (2d ed. 1985).

275. AGBCA 85-503-3, 86-2 BCA 18,807 (1986).

276. Id. at 94,771. The Board found that the 60 days allowed in the contract for the Forest Service to accept the bid put the contractor on notice that award could take that long, no specific date was promised, and that the contractor was permitted to begin work earlier on other items. As contract language put the contractor on notice of possible delay, it should have so anticipated. Brotherhood Timber Co., AGBCA 83-153-1, 85-1 BCA 17,801 at 88,959 (1984)(contract award made within 60 day period for bid acceptance; contractor aware or should have been aware of approaching snow conditions).

277. Dematteo Constr. Co. v. United States, 220 Ct. Cl. 579, 600 F.2d 1384 (1979)(43 day delay in issuing notice to proceed, however, the notice was issued within 60 days of bid opening and within the 65 day period allowed to respond to protests).

278. Diamond "H", Inc., ENG BCA 4141, 82-2 BCA 15,938 at 78,998, 78,999 (1982)(delay in issuing notice to proceed not unreasonable given bid protest both to the Government and the GAO; "Government procurement is conducted in a gold fish bowl and the actions or inactions of a Contracting Officer are subject to close scrutiny by his own superiors, the General Accounting Office, and the courts; "[a] protest to the GAO strikes fear in the hearts of contracting officers").

279. ASBCA 20049, 77-1 BCA 12,398 (1977).

280. Id. at 60,054. The contractor was delayed nine days while the Government belatedly relocated a telephone cable. Id.

281. ASBCA 28412, 84-1 BCA 16,986 (1983).

282. Id. at 84,620. The contract required that the contractor, "contact each occupant to schedule the work in each unit." The Board found a constructive change where the Government subsequently directed the contractor to make the required notification by publication in the daily bulletin, as this limited the contractor's choice. Id.

283. PSBCA 1348, 86-3 BCA 19,277 (1986).

284. Id. at 97,447. The contractor's claim was based on an alleged accelerated work schedule caused by a restriction in the right-of-way permit which required that all work had to be performed and completed over one weekend. The Board found that the impact on the contractor, a small business, which was to delay its next successive contracts, was unreasonable. Id.

285. H.E Crook Co. v. United States, 270 U.S. 4 (1926); United States v. Howard P. Foley Co., 329 U.S. 64 (1946); Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 587 F.2d 486 (1978); John A. Johnson & Sons, Inc. v. United States, 180 Ct. Cl. 969 (1967).

286. Peter Kiewit Sons Co. v. United States, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957).

287. ASBCA 29901, 86-3 BCA 19,101 (1986).

288. Id. at 96,553.

289. Id. The Board stated that, "[w]hat is reasonable depends upon the cause of the delay, the duration and the effects on appellant's operations", citing to, Saylor Constr. and Maintenance, AGBCA 84-342-1, 85-3 BCA 18,331 at 91,940 (1981)(contractor failed to carry burden of proof that partial suspension of performance, effected as a result of wet conditions, was unreasonable). Neither was the Navy exonerated just because the project was completed on time. Compensation for suspension of any part of the work is allowed under the Suspension of Work clause. P & A at 96,554.

290. Ascanti Constr. and Realty Co., VABCA 1571, 1584, 83-2 BCA 16,635 at 82,722 (1983)(recovery allowed under Suspension of Work clause for 219 days of unreasonable suspension of work).

291. G & S Constr., Inc., ASBCA 28677, 86-2 BCA 18,791 at 94,306 (1986)(unusually long delay in resolving security problems was compensable under the Suspension of Work clause).

292. Spruill Realty/Constr. Co., ASBCA 30686, 85-3 BCA 18,421 at 92,497 (1985)(contrary to terms of notice to proceed, Government failed to release site to contractor until 15 days had passed).

293. Renel Constr. Co., GSBCA 5175, 80-2 BCA 14,811 at 73,101 (1980)(language in both the contract and notice to proceed which unequivocally ordered work to proceed constituted implied warranty of site availability; nonavailability of site until 205 days later is unreasonable). That a notice to proceed has been issued is not always a warranty of site availability. Where it was issued during a period of unusually severe weather, a suspension of work order was not found. Welch Constr. Co., PSBCA 217, 77-1 BCA 12,322 at 59,515 (1977)(contracting officer had no duty to suspend work).

294. Wheatley Assocs., ASBCA 24629, 80-2 BCA 14,639 at 72,226 (1980)(eight day delay not reasonable when contrasted against a twenty-one day performance period; contractor mitigation reduced claim to three days).

295. Human Advancement, Inc., HUD BCA 77-215-C15, 81-2 BCA 15,317 at 75,860-1 (1981)(Government interference with contractor's plan of performance).

296. GSBCA 2441, 73-2 BCA 10,098 (1973).

297. Id. at 47,433 4.

298. Edward B. Friel, GSBCA 5470, 80-2 BCA 14,651 at 72,267, mot. for reconsid. denied., 81-1 BCA 14,846 (1980)(denying contractor's access to worksite for 92 days so that personnel and equipment could be moved in preparation for the next phase of construction).

299. Rivera Gen. Contracting, GSBCA 5797, 81-2 BCA 15,288 at 75,698 (1981)(IRS employee refused to let contractor's crew into site because IRS did not like quality of work being done on its offices under GSA contract; contract did not make tenant agency judge of quality - GSA retained this responsibility).

300. Blinderman Constr. Co. v. United States, 695 F.2d 552 (C.A.F.C. 1982)(contractor notified project manager, Navy should have then provided access).

301. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 436 (2d ed. 1985).

302. Noslo Eng'g Corp., ASBCA 27120, 86-3 BCA 19,168 at 96,901 (1986)(contractor knew that it would have to leave site during test firing prior to commencing installation work).

303. Lyburn Constr. Co., ASBCA 29581, 85-1 BCA 17,764 at 88,738 (1984)(express provision provided compensation only if contractor's access to work-site was blocked for more than eight hours; during the term of the contract delays only totaled approximately three and a half hours, therefore, contractor not entitled to compensation).

304. Arundel-Atkinson-Ball (Joint Venture), ENG BCA 4037, 86-1 BCA 18,708 at 94,106 (1986)(letter agreement which deferred contractor's access to site was a binding agreement even though it was not a formal modification as required by agency regulation).

305. ASBCA 24290, 85-1 BCA 17,843 (1984).

306. Id. at 89,306. Contractor never presented any credible evidence that it had obtained the proper equipment. Additionally, half an hour after he had been barred from base the contractor was found in another unauthorized area. Id.

307. 3N Co., ASBCA 30620, 85-3 BCA 18,282 at 91,757 (1985)(security clearance restriction was not unreasonable and the solicitation expressly provided for it, therefore, delay in obtaining was not unreasonable, however, the Board was not, "impressed by 'adroit' contract management by the Government").

308. Torres Constr. Co., VABCA 1919, 86-3 BCA 19,053 at 96,233 (1986)(contractor had not yet completed Phase I and was not entitled to commence other phases of the work). The extent of Government fault is also important. Lack of access may be compensable where it is unreasonable, but not rise to the level necessary to justify a contractor's cessation of work. Sunstate Elects., ASBCA 32468, 87-2 BCA 19,750 at 99,941 (1987)(no proof that access problems constituted a material breach, therefore, lack of access not affect propriety of default termination).

309. Relief is granted under the Suspension of Work clause rather than the Changes clause. No relief is generally available under the Changes clause because, "delays antecedent to a change order and not resulting from it are not justifiable under the Changes article." Model Eng'g &

Mfg. Corp., ASBCA 7490, 1962 BCA 3363 (1962); see also Weldfab, Inc., IBCA 268, 61-2 BCA 3121 (1961). The explanatory comment to Standard Form 23-A Suspension of Work and Changes clauses, 32 Fed. Reg. 16269 (1967), provided: "[e]xcept for defective specifications, the Changes clause as revised will continue to have no application for any delay prior to the issuance of a change order. An adjustment for such type of delay, if appropriate, will be for consideration under the provisions of the Suspension of Work clause." This principle apparently remains in effect even though the FAR has eliminated Standard Form 23-A. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 469 (2d ed. 1985). The applicable rules were slightly different, however, in the older cases without a Suspension of Work clause. For Government directed changes the contractor was compensated for unreasonable delay. J.A. Ross & Co. v. United States, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953). However, where the contractor requested a change, the Government was not required to use due diligence in its evaluation. Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963); B-W Constr. Co. v. United States, 97 Ct. Cl. 92 (1942).

310. Day & Zimmermann-Madway, ASBCA 13367, 71-1 BCA 8622 at 40,092 (1970)(magnitude of impact on contractor's work justified contractor's decision to suspend work pending Government decision on change proposal); Utilities Contracting Co., ASBCA 9723, 65-1 BCA 4582 at 21,913 (1964)(notice of substantial change in method of performance justified contractor's suspension of work); George A. Fuller Co., ASBCA 8524, 1962 BCA 3619 at 18,208 (1962)("irresponsible in the extreme" for contractor to have proceeded with work pending changes).

311. Brand S. Roofing, ASBCA 24688, 82-1 BCA 15,5513 at 76,957 (1981)(Government delay in determining its position unreasonable where it knew of problem months before contractor's change proposal).

312. Noah Lewis, Contractor, VABCA 1349, 81-2 BCA 15,209 at 75,321, mot. for reconsid. denied, 81-2 BCA 15,322 (1981)(Government concedes that six hour delay in determining whether a change in the method of installation was necessary was dilatory).

313. Fidelity Constr. Co., ASBCA 24884, 81-1 BCA 15,022 at 74,339 (1981)(one week unnecessarily lost when Government first rejected but later adopted the contractor's approach of closing all windows after it found unacceptable contractor's price proposal for walling in six of twelve windows).

314. AGBCA 77-152-4, 86-2 BCA 18,804 (1986).

315. Id. at 94,745. The Board determined that a differing site condition entitled the contractor to an equitable adjustment and that it was not necessary to determine whether the suspension had been for an unreasonable period of time as the Suspension of Work clause grants priority to all other adjustment clauses. However, the Board went on to determine that had there been no differing site condition, all but two days of the suspension, the time that the geologist and construction engineer actually needed to analyze and solve the problem, would have been unreasonable. The Board specifically rejected the excuse that the Government may have had other obligations and commitments, stating that the delay was actually caused by defective specifications and that any delay caused by defective specifications is per se unreasonable. Merritt-Chapman & Scott Corp. v. United States, 192 Ct. Cl. 848, 429 F.2d 431 (1971); Chaney and James Constr. Co. v. United States, 190 Ct. Cl. 699, 42 F.2d 728 (1970); Luria Bros. & Co. v. United States, 176 Ct. Cl. 676, 369 F.2d 701 (1966); Preston-Brady Co., VABCA 1891, 86-3 BCA 19,127 at 96,698 (1986). Had this not been a defective specification type case, other commitments of the Government should have been considered in determining a reasonable period of time to derive a solution. See Stephenson Assocs., Inc., GSBCA 6573, 6815, 86-3 BCA 19,071 at 96,332 (1986)(contractor had no right to expect that inspector would devote his entire time to inspection of work).

316. VABCA 1617, 84-3 BCA 17,704 (1984), mot. for reconsid. denied, 85-1 BCA 17,857 (1985).

317. Id. at 88,355. The Board stated that a constructive suspension of work occurs when notice to a contractor of proposed changes to required work reasonably causes it to suspend work rather than perform what would become useless or wasted by the change, citing to, Piland Corp., ASBCA 22560, 78-2 BCA 13,503 (1978).

318. Tranco Indus., Inc., ASBCA 26305 et al., 83-1 BCA 16,414 at 81,654-5, mot. for reconsid. denied, 83-2 BCA 16,697 (1983)(as three month delay unreasonable it effected a constructive acceptance).

319. Gardner Displays Co. v. United States, 171 Ct. Cl. 497, 346 F.2d 585 (1965)(unreasonable delay in inspecting and approving preproduction model for rubber terrain maps).

320. Varo, Inc., ASBCA 25446, 86-1 BCA 18,531 (1985)(Government knowingly used faulty test equipment to inspect and reject lot of fuze switches).

321. Tempest Constr. Co., GSBCA 2573, 68-1 BCA 7056 (1968)(contractor had responsibility for protecting insulating plywood from the weather).

322. ASBCA 26434 et al., 84-2 BCA 17,289 (1984).

323. Id. at 86,093. The trend in Government contracting is to place greater responsibility for conducting inspections on the contractor. J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 554 (2d ed. 1985). Obviously, the Government could not be liable for delay in furnishing test equipment where such is not its responsibility.

324. Gloe at 86,093.

325. Southern Roofing & Petroleum Co., ASBCA 12841, 69-1 BCA 7599 at 35,297 (1969)(as aluminum gravel stop was blackening, project engineer acted reasonably in testing material; eight day delay not unreasonable where Government acted promptly in obtaining and communicating test results).

326. Stamell Constr. Co., DOT CAB 68 271, 75-1 BCA 11,087 at 52,792-4 (1975)(Government reasonably required contractor to submit proposed corrective measures as contractor's initial assessment of problem and proposed remedy had proved in error).

327. ASBCA 32500, 86-3 BCA 19,295 (1986).

328. Id. at 97,570. The Board found the record devoid of any evidence indicating that the Government could not have conducted the inspection on the day it was requested. Id.

329. J.G. Enters., GSBCA 7400, 85-1 BCA 17,890 at 89,597 (1985)(inspectors arrived at job site around 4:30 p.m.).

330. Russell R. Gannon Co. v. United States, 189 Ct. Cl. 328, 417 F.2d 1356 (1969)(72 hour advance notice provision for witnessing of 40 hour operating test on each of 231 dehumidifiers).

331. Maintenance Eng'rs, ASBCA 17474, 74-2 BCA 10,760 at 51,164 (1974)(contractor kept on job extra week because of short hours of inspectors).

332. Fullerton Constr. Co., ASBCA 12275, 69-2 BCA 7876 at 36,613 (1969).

333. Id. Recovery was not allowed, however, under the Suspension of Work clause, but rather under Article 5 of

the contract as an "Act of the Government." The Board found that the delay was not so unreasonable as to be a suspension of work. Id.

334. Drexler Constr. Co., ASBCA 9776, 66-1 BCA 5389 at 25,289 (1966)(Government not required to keep inspectors on an island for two and one half months where contract contemplated that bulk of contractor's submissions would be made within ten days of notice to proceed, but submissions were actually done in piecemeal fashion).

335. GSBGA 6573, 6815, 86-3 BCA 19,071 (1986).

336. Id. at 96,332. Although the Board found that the inspector could have been more cooperative, the delay was not unreasonable. Id.

337. Woodchips, Inc., AGBCA 82-147-3, 82-2 BCA 15,941 at 79,015 (1982)(inspector out sick day inspection requested and the next day; inspection conducted second day following completion of work).

338. For three recent cases see Oxwell, Inc., ASBCA 27523, 27524, 86-2 BCA 18,967 at 95,776 (1986)(Government delayed performance by furnishing defective parts which were needed for turbopump overhauls; parts lacked components or failed to meet Government specification); Bogue Elec. Mfg. Co., ASBCA 25184, 29606, 86-2 BCA 18,925 at 95,479 (1986)(furnishing defective diesel engines converted default termination into one for convenience); Bristol Elecs., Inc., ASBCA 24792, 84-3 BCA 17,543 at 87,428 (1984)(defective Government test equipment excused default termination). Recovery for defective Government furnished property is handled under the Changes clause. See also Witte, Verifications & Correction of Govt-Furnished Contract Drawings, 26 CONT. MGMT. 36 (June 1986).

339. ASBCA 27073, 85-3 BCA 18,228 (1985).

340. Id. at 91,519. The Board concluded that the contractor was able to use the weather station for its intended purpose as a design standard despite occasional problems as it developed design drawings and initiated arrangements for ordering hardware components. However, the contractor was also entitled to receive an operable model weather station and so was allowed recovery to the extent that defects increased the cost of performance. Id.

341. Indian Affiliates, Inc., IBCA 1861, 86-2 BCA 18,749 at 94,421 (1986)(Government could not contract away responsibility for suitable Government furnished property absent abundantly clear provision).

342. Cedar Lumber, Inc. v. United States, 5 Cl. Ct. 539, 550 (1984)(delay in furnishing post-design plans); Oxwell, Inc., ASBCA 27523, 27524, 86-2 BCA 18,967 at 95,776 (1986)(untimely provision of turbopump parts increased average overhaul time by seven and one-half hours); Dewey Elects. Corp., ASBCA 27073, 85-3 BCA 18,228 at 91,520 (1985)(defective first article test equipment). Late delivered Government furnished property is administratively handled under the Suspension of Work clause. Wayne Constr., Inc., AGBCA 242, 70-2 BCA 8443 (1970). Untimely provision of Government property might fall under the Changes clause as a change in the manner of performance where there is no Government furnished property clause. Koppers/Clough v. United States, 201 Ct. Cl. 344 (1973)("[i]f there were no GFP provision in the contract, then it might be possible to agree that there was a change in method for which equitable adjustment is available").

343. ASBCA 28955, 86-3 BCA 19,243 (1986).

344. Id. at 97,308, citing to, Kehm Corp. v. United States, 119 Ct. Cl. 454 (1950)(Government delay in delivering tail assemblies); Harold Benson, AGBCA 458, 77-1 BCA 12,483 (1977).

345. Ballenger Corp., DOT CAB 74-32, 84-1 BCA 16,973 at 84,478 (1983), modified on other grounds, 84-2 BCA 17,277 (1984)(plumbing rough-in information).

346. ASBCA 27411, 85-2 BCA 18,017 (1985).

347. Id. at 90,385.

348. ASBCA 28005, 28662, 85-3 BCA 18,302 (1985).

349. Id. at 91,848-9. The Board went out of its way to comment, however, that a contracting agency may be liable for failures on the part of the using agency and that it, "cannot shrug its shoulders and rid itself of responsibility for failures of the using agency to provide access to the building." Id. at 91,849.

350. J.B.L. Constr. Co., VABCA 1799, 86-1 BCA 18,529 at 93,054 (1985)(contractor was to coordinate alteration work in areas occupied by the VA so that hospital operations would continue during construction period).

351. Ultra Constr. Co., VABCA 1759, 85-2 BCA 18,009 at 90,305 (1985)(no interference by patient in room where no contemporaneous complaint, most of the work was done elsewhere, and work proceeded on schedule).

352. Winston Bros. Co. v. United States, 131 Ct. Cl. 245, 130 F. Supp. 374 (1955)(agency made a rational allocation of Congressionally provided funds).

353. Granite Constr. Co., IBCA 9471-72, 72-2 BCA 9762 at 45,584 (1972)(Presidential act of withholding funds was not a hinderance, but a sovereign act not attributable to the contracting officer for which relief is not available under the Suspension of Work clause).

354. S.A. Healy Co. v. United States, 216 Ct. Cl. 172, 576 F.2d 299 (1978)(agency had approved construction plan but failed to seek required level of funding). A contractor may also be entitled to reimbursement under the express terms of the contract rather than by breach of an implied duty. See Navajo Community College, IBCA 1834, 87-2 BCA 19,825 at 100,309, motion for reconsid. granted, 87-2 BCA 19,826 (1987)(clause 318 granted contractor right to compensation for reduction in funding beyond control of Bureau of Indian Affairs; recovery permitted where reduction authorized by Commissioner of Indian Affairs).

355. C.H. Leavell & Co. v. United States, 208 Ct. Cl. 776, 530 F.2d 878 (1976).

356. ASBCA 26544 et al., 85-1 BCA 17,783 (1984).

357. Id. at 88,836.

358. Id. The Board found that funding restraints and required approvals had become almost routine conditions about which the contractor should have had no complaint. Id.

359. ENG BCA 3691, 78-2 BCA 13,454 (1978).

360. Id. at 65,756. The Board found that a disclaimer provision of the Funds Available For Payments clause did not apply. Id. at 65,757.

361. 177 Ct. Cl. 870, 379 F.2d 559 (1966).

362. International Verbatim Reporters, Inc. v. United States, 9 Cl. Ct. 710, 715 (1986), citing to, Udis v. United States, 7 Cl. Ct. 379, 387 (1985).

363. S.A.F.E. Export Corp., ASBCA 29333, 85-2 BCA 18,138 at 91,053 (1985)(even absent any evidence that individual involved in theft of weapons or terrorist acts, as work related to maintenance of alarm systems and paperwork thereto, no clear abuse of discretion to deny pass).

364. ASBCA 29901, 86-3 BCA 19,101 (1986).

365. Id. at 96,533. The Board found that the actual go-ahead from the Navy depended upon a scheduled gate closing rather than the quality control plan. On 29 June, the contractor was told it could begin work immediately, however, it was also told that Gate Nine would not be closed until 5 July and that the work would have to be limited to not interfere with traffic flow. This restriction precluded any real progress. The Board held this delay unreasonable in light of the Navy's exclusive knowledge of this gate closing. Id.

366. Brothers INC., ENG BCA 4786, 85-2 BCA 18,039 at 90,533 (1985)(contractor principle cause of delay as its submittals differed from contract requirements).

367. G & C Constr. Co., EBCA 371-7-86, 87-2 BCA 19,811 at 100,226 (1987)(Government never received technical data required to evaluate proposal); H.Z. & Co., ASBCA 29776, 87-1 BCA 19,384 at 98,007 (1986)(when contractor submitted a proper submittal, it was promptly approved; when contractor failed to submit a proper submittal, time for Government disapproval was not unreasonable).

368. J.B.L. Constr. Co., VABCA 1799, 86-1 BCA 18,529 at 93,052 (1985)(where both parties are inextricably at fault Government loses right to assess liquidated damages and contractor loses delay damages).

369. Murphy Bros., DOT CAB, 86-2 BCA 18,774 at 94,596 (1986).

370. Ultra Constr. Co., VABCA 1759, 85-2 BCA 18,009 at 90,305 (1985).

371. Gaffny Corp., ASBCA 30345, 87-2 BCA 19,910 at 100,728 (1987)(irregular performance and payment bonds); Xplo Corp., DOT CAB 1240, 86-2 BCA 18,865 at 95,127 (1986).

372. Yankee Telecommunications Laboratories, Inc., ASBCA 25240 et al., 85-1 BCA 17,786 at 88,873 (1984).

373. DOT CAB, 86-2 BCA 18,774 (1986).

374. Id. at 94,596. The Board found that the contractor recognized its deficiencies through its submission of a revised, more formal submittal. This subsequent submittal was the first one reviewable and initiated the Government's obligation to reasonably review the falsework package. Id.

375. ASBCA 27799, 87-1 BCA 19,449 (1986).

376. Id. at 98,283. The unstated problem was lack of availability. Id.

377. See Vic Lane Constr., Inc., ASBCA 30305, 85-2 BCA 18,156 at 91,147 (1985)(unreasonable delay where acceptance follows three months after rejection); Pathman Constr. Co., ASBCA 23392, 85-2 BCA 18,096 at 90,848 (1985)(unreasonable delay where Government approved revised design five months after initial rejection); Fidelity Constr. Co., ASBCA 24882, 81-1 BCA 15,022 at 74,339 (1981)(unreasonable delay for Government to reject then accept contractor's change proposal).

378. Fletcher & Sons, Inc. ASBCA 30895, 85-3 BCA 18,506 at 92,944-5 (1985)(express disclaimer of liability). Value Engineering clauses are found at FAR 52.248-1, -2, and -3 for supplies and services, architect-engineer, and construction contracts, respectively.

379. Omega Container, Inc., ASBCA 30825, 86-1 BCA 18,733 at 94,265 (1986)(ten days is ten days; Government exceeded express limit). First Article approval clauses are found at FAR 52.209-3 and 52.209-4.

380. Nordam, ASBCA 22835, 79-2 BCA 13,948 at 68,455 (1979)(treated under Changes clause where contract provision stated delay in approving first article test would be so handled). Contract provisions concerning submission of first article test reports are not uniform. See Dewey Elecs. Corp., ASBCA 27073, 85-3 BCA 18,228 at 91,520 (1985)(Government only had ten days to approve first article test report; exceeded express limit, therefore, contractor may recover).

381. See Specialty Assembling & Packing Co. v. United States, 174 Ct. Cl. 153, 355 F.2d 554 (1966)(Government delay in providing needed material for assembly of electronic devices); Joseph Penner, GSBCA 4647, 80-2 BCA 14,604 at 72,015 (1980); C.H. Leavell & Co., POD BCA 168, 68-2 BCA 7082 at 32,791 (1968).

382. Maysons Piping Contractors, Inc., ASBCA 28446, 29036, 86-1 BCA 18,626 at 93,592 (1985)(contractor's piecemeal submissions over a seven month period justified lengthy approval period).

383. J.C. Ellis Contractors, ASBCA 32090, 87-2 BCA 19,752 at 99,946 (1987)(lack of documentation coupled with Government testimony leads to conclusion that contractor failed to prove it submitted document earlier); Spectrum Leasing Corp., ASBCA 25724, 26049, 85-1 BCA 17,822 at 89,197 (1984)(unbelievable testimony that contractor felt

Government might change equipment mix because it had changed the site plan).

384. Building Maintenance Specialists, Inc., 85-1 BCA 17,726 at 88,495 (1984)(no evidence of delay from contractor's lack of a key and being required to stop at technical representative's office to gain access to work site); Engineered Elec., ENG BCA 4944, 84-2 BCA 17,316 at 86,288 (1984)(reasonable refusal to give contractor key as building contained valuable equipment and Government representative readily available).

385. Ernest A. Cost, ASBCA 28811, 86-1 BCA 18,559 at 93,207 (1985)(concurrent delay to approve submittals); Structural Finishing, Inc., ASBCA 30260, 85-3 BCA 18,235 at 91,564 (1985)(Government delay to approve submittals concurrent with other delay).

386. J.B. Williams Co. v. United States, 196 Ct. Cl. 491, 450 F.2d 1379 (1971)(constructive change as contractor required to perform extra work).

387. Ocean Elec. Corp., NASA BCA 371-8, 73-2 BCA 10,335 at 48,798 (1973)(steel floor would function as well as aluminum floor "in all essential respects"). The Material and Workmanship clause is found at FAR 52.236-5.

388. Shipco Gen., Inc., ASBCA 29206, 29942, 86-2 BCA 18,973 at 95,825 (1986)(despite adequacy of contractor's method of performance inspectors required alternate method).

389. S. Rosenthal & Son, Inc., ASBCA 6684, 1963 BCA 3791 (1963), mot. for reconsid. denied, 1964 BCA 4467 (1964).

390. 10 Cl. Ct. 672 (1986).

391. Id. at 8. The contractor's argument that as the qualification standards were stated to apply to proposed prime contractors, they did not apply to subcontractors, was rejected by both the ASBCA and the C.A.F.C. Id.

392. Advance Builders, Inc., VABCA 2150, 85-3 BCA 18,315 at 91,892 (1985)(board not substitute its judgment for that of the contracting officer absent abuse of discretion).

393. Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972)(no substantiation for irresponsible characterization; deviations from painting specification were not deliberate).

394. Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982)(subcontractor practice

of telephoning bid prices to general contractors on bid opening day recognized as custom and practice of construction industry in the St. Louis area).

395. Fidelity Constr. Co., ASBCA 24882, 81-1 BCA 15,022 at 75,322 (1981).

396. Pathman Constr. Co., ASBCA 23392, 85-2 BCA 18,096 at 90,848 (1985).

397. Vic Lane Constr., Inc., ASBCA 30305, 85-2 BCA 18,156 at 91,147 (1985).

398. Tenaya Constr., ASBCA 27799, 87-1 BCA 19,449 at 98,449 (1986)(reasonable delay of 33 days in approving contractor's submittal where it failed to state that lack of availability was the problem; subsequent four day turn-around when notified of problem).

399. W.G. Cornell Co. v. United States, 179 Ct. Cl. 651, 376 F.2d 299 (1967)(flexible fiberglass insulation "equal" to rigid insulation).

400. Fox Valley Eng'g v. United States, 151 Ct. Cl. 228, 237 (1960)(arbitrary to reject work of equal quality as previously accepted).

401. Jack Stone Co. v. United States, 170 Ct. Cl. 281, 344 F.2d 370 (1965)(Government not permitted to unreasonably reject substitutions of equal products); Ocean Elec. Corp., NASA BCA 371-8, 73-2 BCA 10,335 (1973)(constructive change from Government's wrongful refusal to permit equal item).

402. Dry Roof Corp., VABCA 1804, 86-3 BCA 19,124 at 96,663-4 (1986)(error to include bid bond in sum with performance and payment bonds as latter two bonds replace bid bond upon acceptance).

403. Unidynamics/St. Louis, Inc., ASBCA 17592, 73-2 BCA 10,360 at 48,934 (1973).

404. A. Teichert & Son, Inc., ASBCA 10265 et al., 68-2 BCA 7175 at 33,293 (1968)(Government accepted contractor's solution after thirteen days; two days would have been ample to resolve the matter).

405. Reese Indus. ASBCA 27741, 29390, 85-3 BCA 18,358 at 92,106 (1985)(delay concurrent with Government fault, both parties to share responsibility for the delay equally).

406. Gardner Displays Co. v. United States, 171 Ct. Cl. 497, 346 F.2d 585 (1965)(unreasonable delay in

inspecting and approving preproduction model for rubber terrain maps).

407. Omega Container, Inc., ASBCA 30825, 86-1 BCA 18,733 at 94,265 (1986)(ten day limit is ten day limit). First Article approval clauses are found at FAR 52.209-3 and 52.209-4.

408. P & A Constr. Co., ASBCA 29901, 86-3 BCA 19,101 at 96,553 (1986).

409. Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687, 721-2 (1963)(unreasonable delay approve shop drawings); Schoenle Constr. Co., PSBCA 1338, 85-3 BCA 18,312 at 91,879 (1985)(Government delay approve shop drawings not delay overall project); Sydney Constr. Co., ASBCA 21377, 77-2 BCA 12,719 at 61,805 (1977)(drawings should have been returned 75 days earlier).

410. Northeast Constr. Co., ASBCA 11109, 67-1 BCA 6282 at 29,090, mot. for reconsid. denied, 67-1 BCA 6375 (1967)(letters said urgently needed).

411. M.S.I. Corp., VABCA 503, 65-2 BCA 5203 at 24,451 (1965), mot. for reconsid. denied, 66-1 BCA 5340 (1966)(delay beyond 30 days unreasonable).

412. C.G. Norton Co., ASBCA 30027, 30579, 85 3 BCA 18,437 at 92,641 (1985).